98TH CONGRESS
1st Session

SENATE

REPORT
No. 98-50

COMPETITION IN CONTRACTING ACT OF 1983

REPORT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 338

TO REVISE THE PROCEDURES FOR SOLICITING AND EVALUATING BIDS AND PROPOSALS FOR GOVERNMENT CONTRACTS AND AWARDING SUCH CONTRACTS, AND FOR OTHER PURPOSES

MARCH 31, 1983.—Ordered to be printed
Filed, under authority of the order of the Senate of MARCH 24 (legislative day, MARCH 21), 1983

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Mr. COHEN, from the Committee on Governmental Affairs, submitted the following

REPORT

[To accompany S. 338]

The Committee on Governmental Affairs, to which was referred the bill (S. 338) to revise the procedures for soliciting and evaluating bids and proposals for Government contracts and awarding such contracts, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

I. PURPOSE

The purposes of S. 338, the Competition in Contracting Act of 1983, are to establish a statutory preference for the use of competitive procedures in awarding federal contracts for property or services, to impose restrictions on the awarding of noncompetitive contracts, and to permit federal agencies to use the competitive method most conducive to the conditions of the contract.

II. INTRODUCTION

The federal government spent more than half of its discretionary budget last fiscal year on the direct purchase of property and services from the private sector. While the dollar value of government contracts has almost tripled during the past decade—from $57.5 billion in fiscal 1972 to $158.9 billion in fiscal 1982—and the nature of the procurement in many cases has become infinitely more complex, the laws which have governed military and civilian contracting over the past 30 years are still intact.

Two statutes provide the foundation for federal contracting. The Armed Services Procurement Act of 1947 applies to the Depart-

ment of Defense (DOD), the National Aeronautics and Space Administration (NASA), and the Coast Guard. 10 U.S.C. § 2301 et seq. The Federal Property and Administrative Services Act of 1949 directs the purchasing activities of civil agencies. 41 U.S.C. § 252 et seq. Both statutes require government agencies to promote the use of full and free competition in the procurement of property and services. 10 U.S.C. § 2305(a); 41 U.S.C. § 253(a). In government contracting, competition is a marketplace condition which results when several contractors, acting independently of each other and of the government, submit bids or proposals in an attempt to secure the government's business.

It is important to understand, therefore, that competition is not a procurement procedure, but an objective which a procedure is designed to attain. The two basic procurement procedures are formal advertising and negotiation. Present law requires that government agencies formally advertise—specify their needs, solicit sealed bids to meet those needs, and award the contract without discussions to the lowest responsive and responsible bidder—whenever feasible and practicable. 10 U.S.C. § 2305; 41 U.S.C. § 253. Formally advertised contracts are awarded on a price competitive basis. This procedure is aimed at securing the most advantageous contract for the government and lessening the opportunity for favoritism.

As long as the government is purchasing property or services where gradations in quality do not preclude selection on the basis of bid price, formal advertising works well and is most appropriate. For more complex procurements, however, contracts cannot reasonably be awarded solely on the basis of price without discussions with the offerors. In these circumstances, negotiation affords the best opportunity to obtain competition.

The Armed Services Procurement Act (ASPA) and the Federal Property and Administrative Services Act (FPASA) authorize negotiated procurement, but restrict its use to certain conditions. The ASPA and the FPASA provide 17 and 15 exceptions to formal advertising, respectively, under which an agency may negotiate. 10 U.S.C. § 2304(a); 41 U.S.C. § 252(c). To control its use, many of the exceptions require a written justification (determinations and finding statement), and some also require approval by the agency head. 10 U.S.C. § 2310(b); 41 U.S.C. § 257(c). While agencies are required to award negotiated contracts competitively to the maximum extent practical (10 U.S.C. § 2304(g); FPR 1-1.301-1), negotiation can be—and frequently is—noncompetitive. Beyond the justification for negotiated procurement, however, present law does not require further justification for noncompetitive (sole-source) award.

Unlike the rigid sealed bid procedures for formal advertising, negotiation allows for considerable flexibility. In a negotiated procurement, contracting officers are permitted to discuss the terms and conditions of the contract with all contractors in a competitive range. 10 U.S.C. § 2304(g); FPR 1-3.804 and 1-3.805-1. Consistent with the flexible nature of negotiation, the evaluation and award procedures for negotiated contracts allow for more discretion. Contracting officers are not required to award to the low offeror, as in formal advertising, but may "trade off" cost to the government against factors such as technical performance or management capability in selecting the source.

Competitive procurement, whether formally advertised or negotiated, is beneficial to the government. First, competition in contracting saves money. Studies have indicated that between 15 and 50 percent can be saved through increased competition. In 1977, the Defense Science Board (DSB) examined more than a dozen examples of competed contracts for weapons such as the AIM-7 missile and found significant evidence of cost savings, with an average savings of nearly 15 percent. The DSB concluded that "competition is a powerful motivator for cost control."

More recently, the General Accounting Office reported, at Senator Carl Levin's request, the results of the competitive procurement for the T-3 tractor—a contract which initially was to have been awarded noncompetitively. The GAO found that the lowest bid in a competitive procurement for the T-3 tractor was 43 pecent less than the price of the contract had it been awarded on a sole-source basis. The savings due to competition, however, are unique to each particular program.

In addition to potential cost savings, competition also curbs cost growth. According to an October 1979 Rand Corporation analysis, entitled "Acquisition Policy Effectiveness: Department of Defense Experience in the 1970's," competitive procurement has led to improvements in system performance and on-schedule delivery by contractors, which have subsequently lowered real cost growth. The Analytic Sciences Corporation (TASC) completed a study in April 1982, entitled "Sustained Competition for Defense Procurements: Evidence, Theory, and Applications," which compared cost growth between competitive and noncompetitive programs. The TASC study found that cost growth in programs during full-scale development varied from 2.0 percent for competitive programs to 40.2 percent for noncompetitive programs, while cost growth during production ranged from 9.65 to 12.7 percent.

Competition may also promote significant innovative and technical changes. In some cases, competition serves as an incentive for firms to be more progressive in developing cost-reducing design changes and improvements in manufacturing technology in order to gain advantage over their competitors. Increased product quality and reliability are potential benefits of competition, especially when performance and quality are included in the solicitation as production award criteria. A long-term benefit of competition, moreover, is enhanced mobilization capability and industry responsiveness.

The last, and possibly the most important, benefit of competition is its inherent appeal of "fair play." Competition maintains the integrity in the expenditure of public funds by ensuring that government contracts are awarded on the basis of merit rather than favoritism.

Despite the significant benefits of competition in contracting, the Committee has found that most federal contracts—by dollar value—are awarded without competition. In fiscal 1982, more than half of the value of all federal contracts was awarded noncompetitively. Even more disturbing is the fact that competitive contracting has declined in recent years and continues to decline this year according to the General Accounting Office (GAO) and data compiled by the Federal Procurement Data Center (FPDC).

III. History

Federal procurement policy dates back to the Second Continental Congress in 1792. By 1809, Congress established the requirement for competition in contracting, with formal advertising as the preferred method. The law stated that "all purchases and contracts for supplies of services * * * shall be made either by open purchases, or by previously advertising for proposals." 2 Stat. 536(1809). The Attorney General has interpreted congressional intent as "preventing favoritism * * * and the notorious mischief of making contracts privately."

Formal advertising procedures were developed in the ensuing years as experience under statute demonstrated the need for additional formalities. In 1861, Congress enacted a law to reaffirm the requirement for formal advertising. 12 Stat. 220(1861). Numerous Comptroller of the Treasury, Comptroller General, and court decisions implemented the statute by further defining the procedures to be followed.

The most significant developments in procurement policy have been generated by war. Prior to World War I, formal advertising procedures were similar to those practices today: specifications for a needed item were published; bids were solicited, and the contracts were awarded to the lowest bidder. Exceptions to these procedures were granted for "public exigencies" and "personal services," and when "it was impracticable to secure competition."

During World War I, however, formal advertising procedures were too inflexible to mobilize government resources. The War Industries Board, established to control wartime resources, relaxed the requirement for formal advertising and authorized procurement by negotiation. The need for full utilization of the nation's industrial strength was the fundamental reason for this shift to negotiation.

Wartime profiteering was curtailed when government procurement returned to formal advertising on a fixed-price basis after the war. To alleviate any further complications, the War Policies Commission recommended in 1930 that formally advertised procurement be replaced by negotiated procurement during war. Rather than allow this wholesale shift, however, Congress provided more exceptions to the formal advertising requirement.

During World War II, the statutory requirement for formal advertising was again relaxed. In December 1941, Congress passed the First War Powers Act, which authorized the President to give the departments involved in the war the power to make contracts "without regard to the provision of law relating to the making, performance, amendment, or modification of contracts." 55 Stat. 838(1941). The War Production Board, given control over wartime production and procurement under Executive Order 9024, went so far as to prohibit the use of formal advertising without specific authorization. Within this broad negotiating authority, competition was actively sought and wartime expertise demonstrated the wisdom of more flexible procedures.

As the end of the war approached, the Policy Procurement Board, a part of the War Production Board, was in charge of the preparatory work for formulating peacetime procurement regula-

tions. In 1945, a task force of the Policy Procurement Board, consisting of officers from the federal procuring agencies, submitted recommendations for post-war procurement policy which were to establish the foundation for the Armed Services Procurement Act. The thrust of the Board's recommendations was that flexibility in procurement was necessary to support the growth and sustainability of an industrial power base. The Board was critical of the pre-war requirement for formal advertising and cited examples of its inadequacy. These examples were incorporated into the ASPA as the basis for the 17 exceptions to formal advertising. 10 U.S.C. § 2304(a).

Congress recognized the need for more flexible peacetime procedures and passed the Armed Services Procurement Act in 1947. The ASPA was viewed by the legislative and executive branches from differing perspectives. The Service Secretaries stated that the "primary purpose of the Act is to permit the War and Navy Departments to award contracts by negotiation when the National Defense or sound business judgment dictates the use of negotiation." Congressional intent, however, provided "for a return to normal purchasing procedures through the advertising-bid method on the part of the armed services." The ASPA, of course, does both by requiring the use of formal advertising, with negotiation authorized by prescribed exceptions.

In 1949, Congress adopted the principles of the ASPA and passed the Federal Property and Administrative Services Act (FPASA) to govern civilian procurement procedures. All but two of the ASPA's exceptions to formal advertising, the need for a facility for mobilization and requirements involving substantial investment or long leadtimes, were included in the FPASA. 41 U.S.C. § 252(c). Based on recommendations by the Commission on Reorganization of the Executive Branch, the First Hoover Commission, the FPASA created the General Services Administration (GSA) to serve as a central organization for federal services such as supply and procurement, records management, and building management. Control of procurement policy and, to a limited extent, certain procurement operations was conferred upon the GSA at that time.

In the years following the enactment of the ASPA and the FPASA, negotiation became less the exception and more the rule. The two factors primarily responsible for the proliferation of negotiated procurements were the development of technical military hardware and the Korean war. Technology, in general, and rocketry, solid-state electronics, and aerospace technology in particular, experienced a quantum jump in sophistication and complexity, requiring greater flexibility in procurement. By 1960, negotiation accounted for over 85 percent of all federal contract dollars.

As a result, the ASPA was amended in 1962 to encourage the use of formal advertising and to clarify procedures and obtain more competition in negotiated procurement. The amendments strengthened the requirement for formal advertising by requiring its use "whenever feasible and practicable under the existing conditions and circumstances." 10 U.S.C. § 2304(a). The amendments also required DoD and NASA to conduct "written and oral discussions" with all firms "within a competitive range" in negotiated procurements. 10 U.S.C. § 2304(g). In addition, the amendments addressed

congressional concern over noncompetitive contract prices being negotiated based on defective data submitted by contractors. This provision of the amendments, referred to as the Truth in Negotiations Act, required contracting officers to obtain all "current, complete, and accurate" cost and pricing data submissions from contractors in certain negotiated contracts over $100,000. 10 U.S.C. § 2306(f). The dollar threshold for defense procurements was raised to $500,000 in 1981.

Negotiated contracts continued to prevail as the "preferred" method of procurement throughout the 1960's and 1970's. In 1969 Congress established the Commission on Government Procurement (P.L. 91-129), a 12-member, bi-partisan body composed of representatives from the Legislative branch, the Executive branch and the private sector, to study the federal procurement process and recommend changes to improve its efficiency. The Comptroller General of the United States was made a statutory member. The Commission completed its 2½ year study in December 1972 and submitted its report to Congress with 149 recommendations, the first of which was to establish an Office of Federal Procurement Policy.

The Commission's second recommendation was to enact legislation to eliminate inconsistencies in the ASPA and the FPASA by consolidating the two statutes and thus providing a common basis for procurement policies and procedures applicable to all executive agencies. Within this context, the Commission further recommended that formal advertising should be retained as the preferred procurement procedure when the number of sources, existence of specifications, and other conditions justify its use, and that competitive negotiation should be authorized as "an acceptable and efficient alternative." The Commission stated in its 1972 report: "the point is not that there should be more negotiation and less advertising, but that competitive negotiation should be recognized in law for what it is; namely, a normal, sound buying method which the Government should prefer when market conditions are not appropriate for the use of formal advertising."

The Office of Federal Procurement Policy (OFPP) was established in 1974 (P.L. 93-400), within the Office of Management and Budget, to provide overall direction in procurement policy. The OFPP was empowered with directive authority to prescribe policies, regulations, procedures, and forms relating to procurement, which agencies were to follow. The 1979 amendments to the OFPP Act (P.L. 96-83), which reauthorized the Office for another four years, redirected the OFPP to focus on three goals: the development of a uniform procurement system, a management system which would implement and enforce the procurement system, and legislative changes needed to implement both systems. The OFPP submitted an integrated proposal for a Uniform Federal Procurement System on February 26, 1982, which incorporated many of the Commission's recommendations and served as a base for the Committee's procurement reform efforts.

In addition to OFPP's proposal, Executive Order 12352 on Federal Procurement Reforms was issued on March 17, 1982, which confirmed the Administration's commitment to improving the effectiveness and efficiency of the procurement process. One of the dir-

ectives included in the Executive Order requires that criteria be established for "enhancing effective competition and limiting noncompetitive actions."

IV. Background and Need for Legislation

Despite the emphasis on competition in contracting and the benefits to be derived from its use, noncompetitively negotiated contracts account for the majority of government procurement dollars. According to figures compiled by the Federal Procurement Data Center (FPDC), out of a total of $146.9 billion awarded by government agencies in fiscal 1982 for contracts over $10,000, $54.4 billion was awarded competitively, $79.2 billion was negotiated noncompetitively, and $13.3 billion used other methods.

Not all government contracts can be awarded competitively. Too often, however, agencies contract on a sole-source basis when competition was available. A July 1981 General Accounting Office (GAO) report, entitled "DoD Loses Many Competitive Procurement Opportunities" (PLRD–81–45), estimated that the Defense Department failed to obtain available competition in awarding $289 million in new fiscal 1979 contract awards surveyed. Moreover, an April 1982 GAO report, entitled "Less Sole-Source, More Competition Needed in Federal Civil Agencies' Contracting" (PLRD–82–40), found that this problem was not confined to the DoD. According to this report, the six civil agencies reviewed, which awarded new sole-source contracts totaling $538.1 million, failed to obtain competition on an esitmated 40 percent of the contract awards. The dollar amounts for both defense and civil agencies represent initial contract obligations, which may be substantially increased through later contract modifications.

Hearings held in the Governmental Affairs Committee during the 96th and 97th Congresses confirm these findings. The Oversight of Government Management Subcommittee examined year-end spending during three days of hearings in 1979 and 1980, and found a relationship between negotiating "under the crunch" and unnecessary noncompetitive contracting. In its July 1980 report, the Subcommittee recommended that additional restrictions were needed on sole-source procurements.

On October 21, 1981, the Governmental Affairs Committee convened a series of hearings on the acquisition process in the Defense Department. Although the purpose of the hearings was to examine the range of problems in defense procurement—inaccurate cost-estimating, sole-source contracting, "gold-plating," among others—much of the testimony focused on the lack of competition in DoD contracting. The second day of hearings, October 27, 1981, concentrated on Deputy Secretary Frank Carlucci's proposed remedies for DoD's procurement problems. Absent from the original list of 31 "Carlucci Initiatives," however, was the need for more competition in DoD contracting. In response to congressional concerns, a 32nd initiative on competition was added, which simply recommended that the Services and Defense agencies be required to establish management programs to increase competition by setting objectives.

Witnesses at these two days of hearings, including Charles Bowsher, Comptroller General, Alice Rivlin, Director of the Congressional Budget Office, Norman Augustine, Chairman of the Defense Science Board, Deputy Secretary Carlucci, DoD, and Dr. Jacques Gansler, Vice President of The Analytic Sciences Corporation, indicated that the failure to use competition in awarding contracts for the production, and in many cases the design, of a major weapons system was a serious and costly problem. For those contracts which were competed, moreover, the witnesses expressed concern that the government placed more emphasis on obtaining one-time competition for the award of a contract with subsequent sole-source development and production than it did on maintaining competition during the life of the acquisition process.

In response to these concerns, Senators William S. Cohen, William V. Roth, Jr., and Carl Levin introduced the Competition in Contracting Act of 1982 (S. 2127) on February 23, 1982. Subsequent cosponsors of S. 2127 included Senators Warren Rudman, David Pryor, Robert Kasten, John Heinz, John P. East, Paula Hawkins, George J. Mitchell, and William Proxmire. The bill was referred to the Governmental Affairs Committee and subsequently to the Federal Expenditures, Research, and Rules Subcommittee, which held a hearing on S. 2127 and the OFPP proposal for a Uniform Federal Procurement System on May 5, 1982. The Subcommittee voted unanimously on August 17 to report S. 2127 favorably, with amendments. The Governmental Affairs Committee held a hearing on S. 2127 on June 29, 1982 and voted 12 to 0 to report the bill on October 1; however, the Senate was unable to consider S. 2127 before adjourning sine die on December 23.

Senator Cohen re-introduced the Competition in Contracting Act of 1983 (S. 338) on February 1, 1983, with Senators Roth, Levin, Rudman, Percy, Durenberger, Pryor, Proxmire, and Mitchell as original cosponsors. Senators Stevens and Danforth subsequently cosponsored the bill. S. 338 was referred to the Governmental Affairs Committee and to its Oversight of Government Management Subcommittee, which assumed jurisdiction over procurement issues during the 98th Congress. The Subcommittee voted 4 to 0 on March 1 to report S. 338 favorably, with amendments. The Governmental Affairs Committee voted 10 to 0 to report the bill on March 17. Pursuant to an agreement of the chairmen and ranking minority members of the Governmental Affairs and Armed Services Committees, S. 338 will be sequentially referred to the Armed Services Committee for consideration of the amendments to the ASPA (Title II of S. 338).

S. 338 is supported by the Administration, the General Accounting Office, the American Bar Association, and several contracting associations. The record established during the past two Congresses is supplemented by comments solicited from the Office of Federal Procurement Policy, the Departments of Defense, Energy, Health and Human Services, Agriculture, Interior, and Transportation, NASA, GSA, Veterans Administration, Small Business Administration, and all the major contracting associations, including the National Security Industrial Association, the Aerospace Industries Association, Computer and Business Equipment Manufacturers Association, Scientific Apparatus Makers Association, Electronic Indus-

tries Association, the Associated General Contractors of America, and the Smaller Business Association of New England.

At its June 29, 1982 hearing last Congress, the Committee received testimony from Professor John Cibinic, George Washington University, Constantine Polites, President of the Constantine N. Polites Company, William A. Long, Deputy Undersecretary of Defense for Research and Engineering (Acquisition Management), and Robert Gilroy, Associate Director of the Procurement, Logistics, and Readiness Division, U.S. General Accounting Office. The consensus among these witnesses was that competition in government contracting may be the requirement, but not the practice. Evidence and testimony presented to the Committee provided a range of explanations for the government's over-reliance on sole-source contracting. The following findings were identified as problems in the present procurement system:

The current procurement statutes are inadequate. The emphasis on formal advertising overshadows negotiation as a legitimate competitive procurement procedure.

The exceptions provided for negotiation are used inappropriately, in some cases, to justify sole-source procurement.

The rush to spend appropriated funds at the end of the fiscal year, often due to ineffective procurement planning, curtails competition.

Market research, used to determine the availability of competition in the marketplace, is often not being done.

Overly-detailed specifications unnecessarily restrict the procuring agency from considering acceptable alternatives, and often result in only one contractor capable of meeting the agency's needs.

In some agencies, there is an institutional bias against competition, or a proclivity for sole-source contracting, which discourages contracting officers from obtaining competition.

The more concentrated the marketplace, the less opportunity there is for competition.

Legitimate reasons preclude the use of competition for some contracts.

STATUTORY SHORTCOMINGS

The ASPA and the FPASA have two primary shortcomings: first, they do not give proper accordance to negotiation as a legitimate competitive procurement procedure; second, they do not adequately restrict the use of noncompetitive negotiation. If contracting officers need to consider factors other than price in making awards or must have discussions with prospective contractors, they are required to satisfy one of the exceptions that permit negotiation. 10 U.S.C. § 2304(a); 41 U.S.C. § 252(c). For all practical purposes, therefore, competitive negotiation lacks recognition as a bona fide competitive procedure.

Despite the emphasis on formal advertising, almost 90 percent of the value of all federal contracts (over $10,000) awarded in fiscal 1982 were negotiated. Of these contracts, $42.9 billion were negotiated competitively—more than three times the amount which were formally advertised. In addition, the use of competitive negotiation

procedures increased by over $17 billion during the past two years, while the value of formally advertised contracts has increased by less than $2 billion. In the chart below, FPDC data on contracting procedures show that competitive negotiation, compared to formal advertising, is actually the "preferred" competitive procurement procedure. Data are provided for contracts awarded by all federal departments and agencies. For purposes of comparison, data are also provided for the Departments of Defense and Energy, which have the largest defense and civilian procurement budgets.

CONTRACTING PROCEDURES

[In billions of dollars]

	Formal advertising	Competitive negotiation	Noncompetitive negotiation	Total contracts [1]
All departments and agencies:				
1980	9.8	25.7	53.7	99.7
1981	9.8	36.9	66.9	123.4
1982	11.5	42.9	79.2	146.9
DOD:				
1980	5.7	17.6	42.7	75.9
1981	6.2	27.6	53.5	96.4
1982	8.4	32.7	63.5	117.0
DOE:				
1980	.3	1.7	5.8	7.8
1981	.3	1.6	8.2	10.1
1982	.9	2.6	11.1	13.8

[1] Includes procurements for foreign governments and contracts which are tariffed or regulated.

A consequence of the present statutory framework is that agencies may be required to formally advertise when negotiation is more appropriate. Donald Sowle, Administrator of the Office of Federal Procurement Policy, testified at the May 5, 1982, Federal Expenditures Subcommittee hearing that, in those situations, the rigid requirements of formal advertising may inhibit the procuring agency from taking advantage of the competitive marketplace:

> Most government requirements cannot be described using [formal advertising procedures] since detailed specifications do not generally exist and it would be too costly to develop. As a result, the number of suppliers tend to shrink, in those instances where detailed specifications are available, to those few—or in some cases only one—who perform to unique government specifications. The government often becomes the sole or major customer of these contractors.

When competitive negotiation is appropriate, moreover, agencies are required to indulge in what the Commission regarded as "expensive, wasteful, and time-consuming" procedures to justify its use. Recognizing that competitive negotiation is a legitimate competitive procurement procedure, the Committee believes that the ASPA and the FPASA should be amended to remove this unnecessary restriction.

Restrictions are needed, however, to control the use of noncompetitively negotiated contracts. Of the $146.9 billion in contracts (over $10,000) awarded in fiscal 1982, approximately 54 per-

cent were negotiated noncompetitively. The Defense Department sole-sourced 54.3 percent of its contracts, while the Department of Energy awarded 80.4 percent of its contracts on a noncompetitive basis. Therefore, a second, and more severe, shortcoming of the present statutes is the absence of any direct restriction on sole-source contracting.

EXCEPTIONS TO FORMAL ADVERTISING

Due to the lack of direct restrictions on noncompetitive contracting, the exceptions to formal advertising are often applied inappropriately to justify the use of sole-source procurement. Although agencies are required to compete negotiated contracts to the maximum extent practicable (10 U.S.C. § 2304(g); FPR 1-1.301-1), exceptions that permit an agency to negotiate also provide large loopholes for avoiding competition.

The justification most frequently invoked is the "competition is impracticable" exception, which agencies sometimes improperly use to award sole-source contracts. 10 U.S.C. § 2304(a)(10); 41 U.S.C. § 252(c)(10). The use of this exception has been allowed by the Comptroller General in bid protest decisions when the government's needs could only be satisfied by property or services which are unique. This exception is not to be used, however, to justify negotiation where the purpose in undertaking the procurement is to satisfy more that the agency's minimum needs.

While the use of this exception only permits negotiation and does not automatically allow for noncompetitive award, it is significant that 56.1 percent of the value of sole-source contracts awarded in fiscal 1982 were made pursuant to this justification, a decrease from 59.7 percent the year before. The Department of Defense "justified" a majority of its sole-source contracts under this exception, 63.4 percent in fiscal 1981 and 57.8 percent in fiscal 1982, while the Department of Energy used the "otherwise authorized by law" exception (10 U.S.C. § 2304(a)(17); 41 U.S.C. § 252(c)(15)), another sole-source exception, to "justify" over 73 percent of its noncompetitive procurements in fiscal 1982.

USE OF NEGOTIATION EXCEPTION AUTHORITY

[In billions of dollars]

	Contracts negotiated noncompetitively	Impracticability exception used	Percent
All departments and agencies:			
1980	53.7	27.9	51.9
1981	66.9	40.0	59.7
1982	79.2	44.4	56.1
DOD:			
1980	42.7	23.1	54.1
1981	53.5	33.9	63.4
1982	63.5	36.7	57.8
DOE:			
1980	5.8	1.1	18.9
1981	8.2	1.5	18.3
1982	11.1	3.1	27.9

By using the broad exceptions to formal advertising as a means to sole-source contract, the justification for awarding a contract noncompetitively is hidden. Revisions are needed in the present statutory framework which would shift the focus from having to justify the use of negotiation to having to justify the use of noncompetitive negotiations. The Committee realizes that sole-source contracting is necessary in certain situations, but strongly believes that tighter control and greater visibility are needed to ensure its proper use.

YEAR-END SPENDING

The Oversight of Government Management Subcommittee determined during its hearings on "Hurry-up Spending" that many agencies were not using the "competition is impracticable" exception properly. The Subcommittee found that an agency's need to award a contract by the end of the fiscal year often became the motivation behind unnecessarily restrictive specifications that subsequently made competition "impracticable."

In response to these oversight hearings, two Inspector General reports from the Departments of Agriculture (USDA) and Energy were issued on year-end spending. The December 14, 1981, USDA report found that the time pressures at year-end curtailed competitive contracting in many cases. According to this report, 37 procurements totaling $8 million were awarded at the end of fiscal 1980 through an abbreviated procurement process. The September 23, 1981, DoE report found that year-end spending, coupled with compressed leadtimes for processing, led to a generally rushed atmosphere in which contracts were inadequately reviewed and insufficiently competed. Of those DoE procurements in which competition was feasible, only 59 percent were awarded competitively in fiscal 1980, a decline from 82 percent in fiscal 1979.

The FPDC data provide additional insight. For fiscal 1979, data provided for the Oversight Subcommittee's "Hurry-up Spending" hearings showed that several civilian agencies had substantial increases in noncompetitive awards at year end. For example, the State Department awarded 92.5 percent of its total fiscal 1979 noncompetitive contracts in the fourth quarter, 58.2 percent in the last month alone. The comparable figures for the Labor Department were 81.8 percent and 50.1 percent; for the Small Business Administration, 70.8 percent and 62.8 percent; and for the Veterans Administration, 48.6 percent and 31 percent.

For fiscal years 1980 and 1981, FPDC data for all federal departments and agencies show that the percentage of total contract dollars awarded noncompetitively through "hurry-up spending" is increasing. FPDC data for the fourth quarter of fiscal 1982 are not included because the figures are subject to change.

YEAR-END SPENDING

[In billions of dollars]

	Contracts in 4th quarter	Contracts negotiated noncompetitively in 4th quarter	Percent
All departments and agencies:			
1980	29.1	14.3	51.9
1981	39.0	22.6	58.1

The Oversight Subcommittee determined from its hearings that agencies which do not develop advance procurement plans are frequently inundated with procurement requests during the fourth quarter of the fiscal year, severely constricting the contracting officers' ability to obtain competition. The Subcommittee recommended in its July 1980 report that the Office of Management and Budget should direct all federal agencies to develop procurement agendas in advance of each fiscal year. While the OFPP implemented this recommendation in 1981 through policy letter 81-1, inadequate advance procurement planning remains a problem and warrants a statutory base in the ASPA and the FPASA.

INSUFFICIENT MARKET RESEARCH

Competition in contracting depends on the procuring agency's understanding of the marketplace. In addition to advance procurement planning, market research is essential in developing this understanding. Agencies which fail to scope the market for potential competitors—whether by telephone or publicizing in the Commerce Business Daily (CBD)—often resort to sole-source contracting when competition is available.

Presently, agencies are required by law to publish a pre-award notice in the CBD for all competitive and noncompetitive defense procurements over $10,000 and civilian procurements over $5,000, unless they fall within one of the prescribed exceptions. 15 U.S.C. § 637(e). The regulations require that agencies publicize in the CBD for 10 days before the issuance of solicitations to provide potential competitors, who are not on current bidders lists, time to prepare their submissions. Once the solicitations have been issued, the regulations provide that bidding time should not be less than 20 days for the procurement of standard commercial articles or services and 30 days for all other procurements. DAR 1-1003.2; FPR 1-1.003-6.

Despite the statutory and regulatory requirements, however, Robert Gilroy testified at the June 29, 1982, hearing that agencies are guilty of conducting insufficient market research. Mr. Gilroy stated that the civilian agencies reviewed in the GAO's April 1982 study rarely publicized pre-award notices in the Commerce Business Daily. The GAO found that agency personnel published preaward notices in the CBD, which invited bids or requested proposals on the prime contract, in only two percent of the awards reviewed. A market search was conducted on only an estimated 15

percent of the awards, including the two percent which were publicized in the CBD.

While the CBD is not the only means of notifying businesses of prospective government contracts, the failure to publish a preaward notice can seriously limit competition because some businesses—particularly small businesses—rely heavily on the CBD to identify contract and subcontract opportunities. This is particularly true for those contractors which have not previously done business with the government, and in the case of small businesses, those which do not have the resources to continually contact all the agency procurement offices which might afford them contract opportunities.

The Committee believes that the time periods for publication provided in regulation should be codified to ensure agency compliance with the CBD notice requirement.

RESTRICTIVE SPECIFICATIONS

Executive agencies are required by law to state purchase specifications for formally advertised contracts in a manner which permits full and free competition. 10 U.S.C. § 2305(a); 41 U.S.C. § 253(a). There are similar requirements for negotiated contracts. 10 U.S.C. § 2304(g); FPR 1-3.101(d). Considered by Professor John Cibinic to be the "cornerstone of competitive procurement," specifications serve initially as the fundamental expression of the agency's need and, in the contract award, as the baseline for the evaluation of offers. Despite the present regulatory requirement that specifications shall be "a clear and accurate description of the technical requirements for a material, product, or service" (DAR 2-101(i); FPR 1-1.305), however, witnesses at the June 29, 1982, hearing testified that agencies have used specifications to restrict competition by unnecessarily defining their needs too narrowly.

While all details in specifications are potentially restrictive in that they narrow the range of acceptable offers, Chairman Roth stated at the hearing that "government specifications * * * are often so restrictive or outdated that only one firm can qualify to bid on the contract." The reasons for improper specifications in some cases are bias or favoritism, and in others, it is the lack of sufficient personnel capable of developing appropriate specifications.

In one example, the Navy determined that Constantine Polites, a small businessman and a witness at the hearing, was nonresponsive for a contract because his scaffolding coupler exceeded the Occupational Safety and Health Administration (OSHA) requirement stated in the specification, despite the fact that his product cost considerably less than his competitor's. In order for Mr. Polites to have competed for the contract, he would have had to reduce the quality of his product to meet the purchase specification.

The consequence of using a restrictive specification in this case, observed Senator Cohen, is that a capable contractor is precluded from competing:

> You have a product that is higher quality and a lower price [than your competitor's] and yet because the way in

which the specification is written, it effectively cuts you out of the business and limits it to a sole-source contract.

Another example of restrictive government specifications involved an Army contract for closed-circuit television systems. According to Mr. Gilroy's testimony, the Army needed camera equipment which did not unnecessarily hamper a soldier's ability to do basic tasks. While the general requirements were simple enough, the Army established three pounds (plus or minus 0.5 pounds) as its minimum camera weight need and 800 as the required line resolution. Because only one contractor could meet the specific camera weight and line resolution requirements, the Army awarded a $150,000 contract noncompetitively. Other contractors offered products that met the Army's minimum requirements, but were determined to be nonresponsive.

The Committee agrees with Mr. Gilroy's recommendation that agencies should take steps to ensure that contract specifications are not unnecessarily restrictive. General guidelines should be established in the ASPA and the FPASA which require specifications to be consistent with the agency's minimum needs and allow restrictive provisions only to the extent necessary to meet those needs.

INSTITUTIONAL BIAS

If there is an institutional bias against competition in contracting, it lies, in part, in the role of the contracting officers who are responsible for maximizing competition. Mr. Gilroy testified that contracting officers often make arbitrary decisions that no capable firms other than the sole source were available and thus do not attempt to attract other sources. Professor Cibinic referred to this problem in his testimony at the June 29 hearing as a "closed-minded attitude." Agency officials become accustomed to, or dependent on, a particular contractor's product and exert pressure on contracting officers to permit sole-source awards.

Risk is a contributing factor. Generally, agency officials have an easier time if they stay with the same contractor throughout the procurement process. For example, the contractor may have amassed the knowledge required for successful production—knowledge which is not easily transferred to a new contractor. Over the years of development and production, moreover, agency and contractor personnel develop a good working relationship, which could be lost if new contractors were involved.

Contracting officers who want to open contract awards to new firms may find their hands tied. Program managers often request specific products or services that only one firm can provide or delay sending the procurement request until time constraints prohibit the contracting officer from obtaining available competition. In its recent reports on DoD and civilian agency sole-source contracting, the GAO found that contracting officers often acquiesced to specific procurement requests from headquarters or accepted, without adequate support, assertions made by technical and end-user personnel that "justified" noncompetitive procurements.

The Committee believes that stronger safeguards are needed in the statutes against superfluous sole-source contracting. Improve-

ments in the present recording and reporting requirements should be implemented to monitor who within the agency required and approved the decision to negotiate noncompetitively and what the justification was for going sole-source. In addition, a qualified professional in each procuring agency should be appointed to serve as an advocate for competition to ensure that every effort made from the time the agency's need is identified through the execution of the purchase allows for effective competition.

CONCENTRATED INDUSTRIAL BASE

The lack of competition in government contracting is not solely the result of procedural problems. In some cases, sole-source contracting may be related to the degree of concentration in the industrial base: the more concentrated the marketplace, the less opportunity for competition.

At the prime-contractor level, the top 25 contractors currently hold approximately 50 percent of the value of all DoD contracts, and only eight firms conduct 45 percent of all DoD research. The degree of concentration at the subcontractor level is much greater, where entrance and exit of the marketplace is easier. Unfortunately, more firms exit than enter. The aerospace industrial base, for example, lost close to 2,000 sub-contractors between 1968 and 1975. The result, oftentimes, is the availability of only one prime- or subcontractor capable of meeting the government's needs for a particular contract.

The government, however, actually may encourage the shrinkage of the industrial base by relying on the same contractors time and again. Noncompetitive contracting may further concentrate the industrial base, which, in turn, leads to less competition. While there is no quick fix for strengthening the U.S. industrial base, increased use of competitive contracting in general and dual-sourcing in particular will broaden the base at both the prime and lower tiers. The Committee encourages dual-sourcing for major weapons system procurement and believes that the ASPA and the FPASA should be amended to authorize its use when it would be in the interest of industrial mobilization and when it would increase competition and likely result in the reduction of overall costs.

LEGITIMATE REASONS

The government is permitted to contract noncompetitively under certain conditions; however, the statutes and regulations provide little guidance on what justifies a legitimate sole-source decision. As a result, agencies have come to rely on Comptroller General decisions in bid protests. The Comptroller General has accepted the following as valid reasons for sole-source contracting: the agency has statutory authority to award the sole-source contract; the government's need for property or service is so urgent that there is not enough time to obtain competition; the sole-source justification demonstrates there is a reasonable basis for concluding that only one contractor is capable of and interested in meeting the government's minimum requirements; the government needs to award the contract to a particular source in order to create or maintain an essential industrial capability or for purposes of industrial mobili-

zation; the terms of an international agreement require a noncompetitive contract; and disclosure to more than one source of the property or services to be obtained would jeopardize the national security.

The problem, however, is that agencies go beyond these accepted situations and award sole-source contracts when competition is available. Although much attention has focused on sole-source contracting over the recent years, the problem persists. Unless sole-source contracting is limited only to those situations in which it is truly warranted, the government stands to lose considerable benefits and to incur greater costs.

V. Provisions of S. 338

The Competition in Contracting Act remedies this problem by providing a new statutory framework which promotes the use of competition and imposes greater restrictions on the awarding of noncompetitive contracts. The provisions of S. 338 apply to all government procurements except those "otherwise authorized by law," such as the procurement of architectural and engineering services authorized by the Brooks Act. 40 U.S.C. § 541 et seq. For purposes of uniformity, the amendments to the Federal Property and Administrative Services Act and the Armed Services Procurement Act, set forth in Titles I and II of S. 338, respectively, are identical. The major provisions of S. 338:

ESTABLISH AN ABSOLUTE PREFERENCE FOR COMPETITION

The procurement statutes promote formal advertising as the primary competitive procedure, despite the fact that negotiation, in practice, is used almost exclusively. The Committee recognizes that competitive contracting takes more than one form and feels that agencies should be able to negotiate competitively without having to justify its use. Presently, contracting officers must develop a written justification supporting a decision to negotiate rather than to formally advertise. 10 U.S.C. § 2310(b); 41 U.S.C. § 257(c).

S. 338 removes the restriction from—and the written justification required for—competitive negotiation and places it on par with formal advertising. Together, they constitute competitive procedures, with exceptions provided for noncompetitive procedures, i.e., sole-source contracting. Within this new statutory framework, executive agencies are required to use competitive procedures whenever possible in awarding federal contracts for property and services. Agencies would be permitted to invite sealed bids and make award without discussions (formal advertising) or request proposals and make award with discussions (competitive negotiation), whichever competitive procedure is most conducive to the conditions of the contract. Generally, the nature of the property or services to be acquired and the market circumstances will determine the appropriate competitive procedure to be used.

The objective, conceptually, is to establish an absolute preference for competition and, practically, to provide more flexibility in contracting. William Long, Deputy Undersecretary for DoD Acquisition Management, testified at the June 29, 1982, Governmental Af-

fairs hearing that this new approach to competitive procurement best represents the real procurement world:

> For many years, we have been troubled that many knowledgeable people have equated competition to formal advertising alone, overlooking the use and benefits of competitive negotiation. Eliminating the term "formal advertising" and uniting all types of competition under the broad term "competition" would be most helpful in this regard. Further, it would be beneficial and helpful in our efforts to more effectively obtain the benefits of competition in defense procurement.

While competitive negotiation is recognized in S. 338 as a bona fide competitive procedure, the Committee emphasizes that traditional formal advertising procedures are by no means cast aside. In fact, agencies are required under S. 338 to solicit sealed bids when (1) there is sufficient time, (2) award is based on price, (3) discussions are not necessary, and (4) more than one sealed bid is expected to be submitted. Competitive negotiation may be used—without any justification—when any of these criteria are not met. By eliminating the need for a determination and finding to justify every negotiated contract, S. 338 lifts a great administrative burden off the shoulders of the executive agencies.

REQUIRE AGENCIES TO MAKE AN AFFIRMATIVE EFFORT TO OBTAIN EFFECTIVE COMPETITION

Executive agencies are not only required to obtain competition under the provisions of S. 338, but also to increase its effectiveness. Although "effective competition" is not amenable to rigid definition, a description is important to establish the thrust of the legislation and the rationale for many of its provisions. Five components characterize "effective competition": (1) the information required to respond to a public need is made available to prospective contractors in a timely fashion; (2) the government and contractor act independently; (3) two or more contractors act independently to respond to a public need by offering property or services which meet that need; (4) the government has expressed its need in a manner which promotes competition; and (5) there is no bias or favoritism, other than required by law, in the contract award.

Effective competition is predicated on advance procurement planning and an understanding of the marketplace. S. 338 requires executive agencies to establish and maintain a procurement planning system which would ensure that the efforts of all procurement personnel are coordinated as early as practicable in the procurement process. Agencies are also required to conduct a market search, which would include publicizing a pre-award notice in the Commerce Business Daily, to invite competition on a prospective contract. Advance procurement planning and market research are interrelated functions which are used to varying degrees, depending on the dollar value of the procurement, complexity of the requirement, and urgency of the need.

Professor Cibinic testified at the June 29, 1982, hearing that codifying the present regulatory requirement for advance procurement

planning and market research is necessary in view of unsatisfactory agency past performance:

> Opportunities for obtaining or improving competition have often been lost because of untimely, faulty, or the total lack of advance procurement planning. Noncompetitive procurement or inadequate competition also has resulted many times from the failure to develop specifications or to perform adequate market surveys and identify potential sources. Some agencies have already implemented some of these reforms, but there are many opportunities for improvement. By requiring effective competition, Congress will serve notice on the agencies that they will need to do more than the minimum to comply with the statute.

The Committee recognizes, however, that the competitive procedures required of large purchases may not be cost effective for small purchases. For procurements under $25,000, the costs of holding unlimited competition may exceed the benefits to be derived. Therefore, S. 338 provides a basis in statute for regulations to establish separate small purchase procedures, which would allow agencies to scale down their efforts as long as they obtain reasonable competition. The bill, however, specifically precludes agencies from dividing a large contract into several small ones for the purpose of taking advantage of the simplified small purchase procedures.

For the procurement of major weapons systems, S. 338 authorizes the use of dual-sourcing which is a restrictive form of competitive procedures. Under dual-sourcing, an agency awards a contract to establish a second source for a property or service, using competitive procedures but excluding the incumbent contractor from competing, for the purpose of achieving parallel production capability for future competition. S. 338 permits the use of dual-sourcing when it would increase competition and likely result in the reduction of overall costs, or when it would be in the interest of industrial mobilization in the event of a national emergency. This latter condition is differentiated from the exception to competitive procedures through which agencies are permitted to award contracts on a sole-source basis to maintain industrial mobilization. Dual-sourcing would be justified for mobilization reasons, for example, when the Defense Department intends to award a competitive contract to establish another West Coast shipbuilding capacity while excluding East Coast shipyards from competing on the contract.

The Defense Department currently employs other legitimate techniques of competitive procurement, in addition to dual-sourcing, which are not precluded by S. 338. They include: (1) Leader/follower—the developer or sole producer of a system (the leader company) furnishes manufacturing assistance and knowhow to a follower company, selected by the government using competitive procedures, to enable the follower company to become a second source of supply for the system and a future competitor; (2) Joint teaming—a team of two or more firms is awarded a development contract, using competitive procedures, with the effort to be split among the firms; in the future, the two firms will compete indepen-

dently for the production contract; and (3) Competitive parallel development—two or more firms develop and validate separate competing systems to meet a specific need, resulting in a prototype demonstration or fly-off between the competitors.

The procedures for awarding contracts for common-use items under the Federal Supply Schedule are also accommodated by S. 338, and recognized by the Committee to be competitive. The Federal Supply Service, within the General Services Administration, established the Federal Supply Schedule program to simplify the procurement process for commercially available items by entering into indefinite delivery type contracts with suppliers. A schedule of all such contracts, assembled in catalog form, is available to the agencies for ordering.

PERMIT FLEXIBILITY IN SPECIFICATION DEVELOPMENT

In addition to advance procurement planning and market research, the affirmative effort required of agencies to obtain effective competition includes the development of nonrestrictive specifications. S. 338 sets forth broad guidelines for agencies to follow in defining their needs in order to maximize, rather than limit, competition. The first standard requires executive agencies to state their purchase specifications according to their needs and the market available to meet those needs. A second standard codifies the present regulatory requirement that specifications must be written in a nonrestrictive manner. This standard complements the first by ensuring that specifications are no more detailed or restrictive than is necessary to meet the agency's minimum needs.

The Committee also recognizes that no one type of specification is appropriate for all procurements. Under the new solicitation procedures provided in S. 338, agencies are required to specify their needs in either functional, performance, or detailed design terms, whichever will ensure timely performance of what they need and will promote the use of effective competition. This flexibility can enhance innovation and increase effective competition by permitting a range of distinct property or services to qualify as responsive when desirable, but permit the use of design specifications when most appropriate. Wherever practical, the Committee feels that contractors should be told what the government needs and not how to do it. The advantage of this approach is that it allows the government to take advantage of the competitive marketplace.

The OFPP's Acquisition and Distribution of Commercial Products (ADCOP) program has already resulted in the review and possible elimination of thousands of detailed specifications. The substitution of reasonable commercial item descriptions (CIDs), which are essentially performance specifications, for detailed specifications has resulted in projected savings of over $9 million in the purchase of meat for 1 year, almost $800,000 in the purchase of undershirts, $81,000 on towels, $65,000 on boxer shorts and bedsheets, and over $200,000 on such items as soy sauce and worcestershire sauce. The use of functional specifications instead of detailed specifications, in one case, resulted in the reduction of the price of electrical parts by 94 percent.

ESTABLISH LIMITED EXCEPTIONS FOR NONCOMPETITIVE PROCUREMENTS

The Committee recognizes that not all government contracts can be awarded competitively. The procurement statutes and regulations provide little guidance, however, on what reasons or circumstances justify a noncompetitive procurement. S. 338 provides six exceptions to competitive procedures which parallel the conditions under which the Comptroller General has historically permitted agencies to award on a sole-source basis. By shifting the emphasis from having to justify the use of negotiation, which has always been pro forma, to having to justify the use of noncompetitive procedures, S. 338 will restrict sole-source contracting to only those situations when it is truly necessary. The award of a contract on a sole-source basis would for the first time constitute a clear violation of statute unless permitted by one of the following exceptions.

The first exception permits the use of noncompetitive procedures when the property or services needed by the government are available only from a single source and there are no competitive alternatives. This exception is considerably more restrictive than the "competition is impracticable" exception in the present statutes (10 U.S.C. § 2304(a)(10); 41 U.S.C. § 252(c)(10)), as it permits a sole-source procurement only when it is truly warranted. This exception requires that the agency's purpose in undertaking a sole-source procurement is to satisfy its minimum needs. If competitive alternatives can be made available by modifying the requirement or redescribing it in terms of the function or performance required without impairing the agency's mission responsibility, a noncompetitive procurement would not be permissible.

An example of a sole-source condition which is authorized under this exception would be a procurement for additional units or replacement items in which specified makes and models are required for standardization and interchangeability. Another example would be the award of a "follow-on" production contract when the nonrecurring start-up costs incurred by the government to establish competitive alternatives, such as the transfer of technology from the incumbent contractor and the costs of government-provided unique tooling, outweigh the benefits of competition. The Committee emphasizes that this first exception is not intended to serve as a "carte blanche" justification for awarding all "follow-on" contracts noncompetitively.

The second exception allows sole-source procurement when the agency's need for the property or services is of such unusual and compelling urgency that the government would be seriously injured by the delay involved in using competitive procedures. This exception strengthens the present "public exigency" exception (10 U.S.C. § 2304(a)(2); 41 U.S.C. § 252(c)(2)) by incorporating regulatory language which requires that the agency's need must be "compelling and of unusual urgency, as when the government would be seriously injured—financially or otherwise—if the supplies were not furnished by a certain date." DAR 3-202.2; FPR 1-3.202. An urgent situation is one which threatens immediate harm to health, welfare, or safety.

The third exception justifies the use of noncompetitive procedures when it is necessary to award a contract to a particular con-

tractor in order to maintain an essential industrial capability in the United States or to achieve national industrial mobilization. This exception may be used where it is necessary to train, continue in production, or keep in business, facilities or supplies which are vital to national programs or to assure their availability in the event of a national emergency. This exception may also be used to maintain properly balanced sources of supply, or to establish second sources of supply, in the interest of industrial mobilization and future competition.

The fourth exception allows noncompetitive procedures to be used when required by international agreement or treaty or directed procurements for foreign governments when the cost is to be reimbursed by the foreign government. This exception deals with two separate situations. The first situation in which noncompetitive procurements are justified is when an international agreement is made, e.g., between NATO countries, to purchase a particular weapons system from one source. The second situation involves U.S. procurement of property or services to be sold to another country. In this case, the foreign government chooses the contractor.

The fifth exception states that noncompetitive procedures are permitted when a statute provides that the procurement may be obtained through a specified source. This exception would apply, for example, to the purchase of property or services from workshops sponsored by the Committee for the Purchase from the Blind or Other Severely Handicapped. In addition, set-asides for small businesses owned and controlled by socially and economically disadvantaged persons, which are authorized under section 8(a) of the Small Business Act, could be awarded by an agency to the Small Business Administration on a sole-source basis using this exception. The SBA subsequently subcontracts to an eligible small business. Awards made by agencies under the Small Business Innovation Act (P.L. 97-279) would be another example of an appropriate use of this exception. Contracts for the construction or improvement of Indian reservation roads, awarded pursuant to the Buy Indian Act (25 U.S.C. § 47), as well as other Indian preference statutes would be included under this exception.

The sixth exception allows noncompetitive procurement when disclosure to more than one source of the property or services to be obtained would jeopardize the national security. A security classification does not, however, automatically justify the use of this exception. Classified procurements can be competed among contractors with proper clearances. Only in those situations where national security could be threatened by disclosure of the solicitation package to more than one source would agencies be permitted to award a sole-source contract.

Absent from the list of exceptions to competitive procedures are unsolicited proposals. While it may be policy to foster and encourage unsolicited proposals, the regulations specifically state that such proposals should not be merely an advance proposal for a specific agency requirement which would normally be procured by competitive methods. DAR 4-901; FPR 1-4.901. The Committee realizes that unsolicited proposals are often the source of innovative ideas, and recognizes that the incentive for contractors to submit

unsolicited proposals may be lessened by subjecting them to the competitive procedures prescribed in S. 338. The Committee's concern, however, is that unsolicited proposals often actually are solicited by the agencies. In these cases, awarding a sole-source contract to a contractor which ostensibly submitted an "unsolicited" proposal would violate regulation and not be fair to potential competitors. Furthermore, the Committee believes that truly meritorious unsolicited proposals should prevail in a competitive award.

Presently, agencies are permitted by regulation to award a sole-source contract based on an unsolicited proposal when it has received a favorable technical evaluation, unless the substance of the proposal is available without restriction from another source, or a competitive procurement is otherwise appropriate. DAR 4-910(b); FPR 1-4.910(b). S. 338 would require agencies to conduct a market search, without disclosing the offeror's ideas, proprietary information, or solution contained in the unsolicited proposal, in order to determine whether the substance of the proposal is available without restriction from another source. Offerors may mark data contained in the proposal with a restrictive legend designating which data should not be disclosed outside the government. If the market search is successful in finding other competitors, a solicitation document stating the agency's minimum requirements will be provided. If the substance of the proposal is not available from any other competitors, sole-source award is permitted under the first exception.

S. 338 further safeguards against unnecessary sole-source contracting by prohibiting agencies from using noncompetitive procedures unless they have provided advance notice of intent to award a sole-source contract, which invites bids or proposals from potential competitors, in the Commerce Business Daily (CBD). Senator Levin amended S. 338 in Committee to strengthen this safeguard by precluding award on a sole-source basis unless (1) in the case of contracts over $25,000, the agency considers any bid or proposal received from potential competitors in response to the CBD notice, and (2) for contracts over $100,000, the use of noncompetitive procedures is approved either by the head of the procuring activity (HPA) or his/her designee, provided it is someone at a level higher than the contracting officer (CO). The Levin amendment is intended to ensure that the notice of noncompetitive contracts receives meaningful consideration by the procuring agency and to bring greater accountability to the decision to use noncompetitive procedures. Although the amendment allows for delegation of review authority from the HPA to a level higher than the CO, the Committee intends that the designated person should be as high in the chain of command for the procurement decisions as is reasonably possible.

INCORPORATE THE EVALUATION AND AWARD PROCEDURES FROM THE PRESENT STATUTES

Within the new statutory framework established by S. 338, the evaluation and award procedures for sealed bids and competitive proposals are the same as those currently required in the ASPA and the FPASA for formal advertising and negotiation. S. 338 re-

quires sealed bids to be opened publicly at the time and place specified in the solicitation, and to be evaluated without discussions with the bidders. In accordance with present procedures, contracts are to be awarded to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the government, price and other factors considered. 10 U.S.C. § 2305; 41 U.S.C. § 253. "Other factors," in the case of sealed bids, include (1) foreseeable costs or delays to the government resulting from difference in inspection, location of supplies, and transportation, (2) local, state, and federal taxes, and (3) other price-related factors. DAR 2-407.5; FPR 2-2.407.5.

Competitive proposal procedures for evaluation and award are necessarily less structured. S. 338 establishes a general framework for the conduct of competitive negotiation. Executive agencies are permitted to discuss their requirements or the terms and conditions of the proposed contract with offerors after receipt of proposals but prior to award of the contract. S. 338 adopts and extends the ASPA provision, which requires that military agencies conduct written or oral discussions with all responsible offerors in the competitive range, to apply to civilian procurements as well. 10 U.S.C. § 2304(g). The "competitive range" is to be determined by the contracting officer based on price, technical, and other salient factors (not necessarily related to price) and is to include all proposals which have a reasonable chance of being selected for award.

After written or oral discussions have been conducted with all offerors within the competitive range, agencies are required to solicit "best and final offers." Once discussions are held and best and final offers are received, agencies are not permitted to conduct further discussion beyond minor clarifications, unless it is in the government's interest to reopen discussions and solicit another round of best and final offers. This authority provided in S. 338 is not to be construed, however, to permit "auctioneering" through the random reopening of discussions and soliciting of multiple best and final offers for any contract. Auction techniques, such as indicating to an offeror a price which must be met to obtain further consideration or informing the offeror that his or her price is not low in relation to another offeror, are strictly prohibited. Multiple best and final offers, in these cases, serve to undermine the competitive negotiation process.

SET A UNIFORM THRESHOLD FOR CERTIFICATION OF COST OR PRICING DATA

Prior to the award of any negotiated defense contract, subcontract, or modification to such contracts and subcontracts which exceeds $500,000, contractors are required to submit cost or pricing data and certify that the data provided are "accurate, complete, and current." 10 U.S.C. § 2306(f). The Federal Procurement Regulations require certification of cost or pricing data for civilian negotiated contracts over $100,000. FPR 1-3.807. The purpose of this "truth-in-negotiations" provision is to provide the basis for retroactive price adjustment, in the event that data submitted prior to award were not accurate, complete, and current, without costly litigation to establish intent. As introduced, S. 338 extended the statu-

tory requirement for certified cost or pricing data in the ASPA to cover civilian procurements under FPASA, thereby establishing a uniform threshold in both statutes at $500,000.

The Truth in Negotiating Act, as it was originally enacted in 1962, set the dollar threshold at $100,000. In 1981, this threshold was raised to $500,000 by the House Armed Services Committee during its consideration of the fiscal 1982 DoD Authorization Act, with the Senate Armed Services Committee concurring in conference. The rationale for raising the threshold for certified cost or pricing data was to accommodate inflation and to lessen the burden on contractors. The GAO opposed this increase in the threshold for defense contracts, as well as the increase included in S. 338 for civilian contracts. While contractors may still be required to provide cost or pricing data for negotiated contracts under $500,000 for pre-award audit purposes, GAO argues that, without certification, agencies lack the legal ammunition to deter defective pricing. For this reason, the Committee at its March 17 markup adopted an amendment offered by Senator Levin which establishes a unform threshold of $100,000 for requiring certified cost or pricing data prior to award of all contracts using other than sealed bid procedures. The Committee is concerned by the lack of post-award audits on negotiated contracts under $500,000 and encourages the Department of Defense to devote more audit resources to these contracts.

REQUIRE AGENCIES TO PUBLICIZE ALL PROSPECTIVE CONTRACTS

The Committee strongly believes that all contractors should have the opportunity to compete for a government contract, while only those capable of meeting the government's need should be considered for award. The procurement notice provision in S. 338, which requires agencies to publish notice of prospective competitive and noncompetitive contracts over $10,000 in the Commerce Business Daily, is an integral part of the affirmative effort required of all agencies to obtain effective competition.

The notice provision in S. 338 remedies two problems with the CBD requirement in present law which Senator Levin, who introduced legislation last Congress requiring pre-solicitation notice, discussed at the June 29, 1982, hearing:

> The only way companies can compete is if they know about a contract and in many cases the Commerce Business Daily is the only way for small companies to become aware of government contracts . . . [Witnesses have] testified that the contract descriptions [in the CBD] were frequently insufficient, and that the period of time for competitive responses was too short. In other words, by the time they received the Commerce Business Daily, read it, and prepared a response, the contract had already been awarded.

S. 338 codifies the time periods for publication provided by regulation. DAR 1-1003.2; FPR 1-1.1003-6. To ensure compliance, agencies are prohibited from (1) issuing a solicitation unless the agency has published a notice of such soliciation in the CBD for 15 days

(an increase of five days over the present regulatory requirement) and (2) establishing a deadline for the submission of bids or proposals any earlier than 30 days after the solicitation was issued. The pre-solicitation notice gives contractors the time to review the CBD for contract opportunities and request solicitation packages from the procuring agencies, and it also provides contractors an equal footing from which to begin to prepare their bids or proposals. With this additional time, contractors are better able to utilize the full 30 days from the time solicitation packages are distributed until competition is foreclosed to prepare their submissions.

Notices which provide incomplete or inaccurate information detract from the utility of the CBD. S. 338 specifies the information which a proper notice should include: a description of the property or service needed by the agency, the name and address of the agency official who may be contacted for the purpose of obtaining a copy of the solicitation, and a statement that any person may submit a bid, proposal, or quotation which shall be considered by the agency. For noncompetitive procurements, the pre-award notice should include, in addition to this information, the justification for going sole source and the identification of the intended source. Presently, pre-award sole-source notices are published—if published at all—primarily for informational purposes, such as alerting small businesses to subcontracting opportunities, and strongly discourage proposals for the prime contract.

Under the solicitation provisions of S. 338, agencies are not explicitly required to issue solicitation packages to all contractors responding to a pre-award notice. The Committee does not, however, intend to grant agencies the authority to deny packages arbitrarily. The purpose of the pre-award notice is to open competition to all offerors who can meet the agency's needs. To serve this purpose, solicitation packages should be available upon request. In situations where competition is not anticipated and solicitation packages are therefore not prepared, as is often the case with contract modifications and extensions, the Committee intends that agencies shall provide potential competitors with solicitation packages or comparable information.

Exceptions are provided to the CBD advance notice requirement which are separate but identical in almost all cases to the exceptions for noncompetitive procedures. The first exception to competitive procedures, which permits agencies to use noncompetitive procedures when only one source is available and there are not competitive alternatives, is not included in the exceptions to the advance notice requirement. In this situation, the notice is used to flush the marketplace for potential competitors. Exceptions two through six for noncompetitive procedures apply to the advance notice requirement. During the Committee markup, Senator Cohen offered a technical amendment to S. 338 which addressed a concern raised by the intelligence community that the exception for classified procurements was too restrictive. Under S. 338 as introduced, an agency would have been required to publicize notice of those classified procurements which could be worded without disclosing classified information. In some cases, however, the mere disclosure of the agency's need could pose security problems. Senator Cohen's amendment exempts from the notice requirement those procure-

ments in which disclosure of the agency's need would compromise the national security.

One additional exception to notice, not included as an exception to competitive procedures, is for those procurements in which the head of the procuring agency, with the concurrence of the Administrator of the Small Business Administration, determines that advance notice is not appropriate or reasonable. This exception to notice, which is included in present law, has been used only once during the past 10 years involving a Justice Department contract to transfer prisoners.

S. 338 also requires agencies to publish a post-award notice in the CBD for all contracts over $10,000 which are likely to result in the award of subcontracts, unless disclosure of the contract would compromise national security. This post-award notice would serve to alert small businesses to potential subcontract opportunities. Although agencies are not required to provide pre-award notice of prospective noncompetitive contracts under S. 338, they are not prohibited from doing so if they want to obtain competition for subcontracts which will be settled before the prime contract is awarded.

ESTABLISH AN ADVOCATE FOR COMPETITION

Present regulations require contracting officers (COs) to maximize competition for each contract award. GAO found, however, the COs often acquiesce to the sole-source procurement requests of headquarters, technical personnel, and end-users. In effect, there is no clear responsibility and accountability for competition in government contracting.

During the Committee markup of S. 2127 last Congress, Senator Pryor amended the bill to establish an advocate for competition in each procuring agency to promote the use of competitive contracting procedures, a proposal he originally introduced in December 1981. The advocate's primary responsibility will be to ensure implementation of the new operating procedures, which require that agencies make an affirmative effort to obtain competition. Specifically, the advocate will ensure that competition is not foreclosed by restrictive need statements, unnecessarily detailed specifications, poor procurement planning, or arbitrary agency action. The objective, in short, is to instill accountability into the procurement process.

This provision provides the heads of each executive agency the authority to designate an existing officer or employee as the advocate for competition. The advocate is to be relieved of all inconsistent duties and responsibilities and provided with the necessary staff and resources. Executive Order 12352, issued in March 1982, established the Procurement Executive position to oversee the development of procurement systems and to evaluate system performance. The Procurement Executive could also serve as the competition advocate.

STRENGTHEN THE CURRENT RECORDING AND REPORTING REQUIREMENTS

Under the Office of Federal Procurement Policy Act, the Federal Procurement Data Center was established within the General Serv-

ices Administration to collect, develop, and disseminate procurement data. 41 U.S.C. § 405(d)(5). As the official federal procurement data base, the system is intended to provide a basis for reports to the President, the Congress, federal executive agencies, and the general public.

S. 338 facilitates congressional oversight by requiring agencies to establish and maintain a record, by fiscal year, of the procurements other than small purchases in which noncompetitive procedures are used. The information to be included in the record would designate the contractor who received the award, the property or services which were obtained, the dollar value, the reason for using noncompetitive procedures (pursuant to one of the six exceptions), and the position of the person in the contracting agency who required and approved the sole-source award. These data would be transmitted to the Federal Procurement Data Center.

S. 338 also requires the advocate for competition in each procuring agency to issue an annual report to Congress on the agency's use of competition in contracting. Specifically, the report will summarize the steps taken by the agencies to increase competitive contracting during the previous year and will recommend specific actions to be taken in the following year. The report is to be submitted to the Senate Committee on Governmental Affairs and the House Committee on Government Operations no later than September 30 of each year, for fiscal years 1983 through 1986.

OTHER ISSUES CONSIDERED BY THE COMMITTEE

In addition to the discussion of the primary provisions of the Competition in Contracting Act, several other issues concerning the implementation of S. 338 and the general distinction between contracts, grants and cooperative agreements were raised during the Committee's consideration of S. 338.

IMPLEMENTATION

The Department of Defense recommended that the proposed amendments to the ASPA and the FPASA should be implemented first on a test basis before legislating government-wide. The amendments to the ASPA, according to William Long's testimony at the June 29, 1982, hearing, provide "a considerable change in time-honored procurement procedures."

While S. 338 increases competition in contracting through greater flexibility and restricts the use of sole-source contracting, the Committee does not consider S. 338 to represent a "considerable change," which could "disrupt the orderly processing of procurements" if not tested. Within the new statutory framework established by S. 338, the evaluation and award procedures for sealed bids and competitive proposals are the same as those currently required for formal advertising and negotiation. In this regard, no substantive regulatory modifications in evaluation and award procedures would be required for implementation of S. 338.

Considering the history of Comptroller General and court decisions which have interpreted the present evaluation and award procedures, and more significantly, the familiarity which results from over 30 years of experience, the Committee feels that the

present formal advertising and competitive negotiation procedures should be retained. The purpose served by substituting the new terms "sealed bid" and "competitive proposal" procedures for "formal advertising" and "negotiation" is to eliminate the competitive and noncompetitive connotations, respectively, associated with the present language.

Furthermore, the Committee believes that the evidence of unnecessary sole-source contracting is so compelling that permanent reforms in the procurement statutes must be implemented. The Committee found no evidence to suggest that a test period was either necessary or desirable, and believes that the 6-month implementation period provided in S. 338 will be sufficient for a smooth transition.

THE USE OF CONTRACTS VS. GRANTS OR COOPERATIVE AGREEMENTS

A tangential issue to competition in government contracting is the use of grants and cooperative agreements instead of contracts to circumvent the requirements of the procurement process. In some cases, agencies have awarded grants on a sole-source basis for services which should have been procured competitively under contract. In view of the increased effort required of agencies to obtain effective competition under S. 338, the Committee is concerned that this practice could become more prevalent.

Congress enacted the Federal Grant and Cooperative Agreement Act of 1977 (41 U.S.C. § 501 et seq.) to establish guidelines for the proper use of grants, cooperative agreements, and contracts. The Act distinguishes between procurement and assistance relationships based on the "authorized federal purpose." If the government's purpose is to acquire property or services for its direct benefit or use, then a contractual agreement is appropriate. Grants or cooperative agreements are to be used, on the other hand, when the principal purpose of the relationship is to transfer money, property, or anything of value to a recipient to accomplish a public purpose of support or stimulation.

The Act gives agencies considerable latitude in selecting the instrument to be used in a specific transaction. In fact, the GAO found that several of the assistance awards it sampled in 1981 should have been procured under contract, and recommended in a September 1981 report entitled, "Agencies Need Better Guidance For Choosing Among Contracts, Grants, and Cooperative Agreements" (GGD-81-88) that the OMB should revise its regulations to more precisely prescribe the conditions under which contracts, grants, and cooperative agreements are to be used. To date, however, the OMB has circulated revised regulations but has not issued anything final. The Committee joins the GAO in recommending that the OMB revise and issue its regulations to preclude further circumvention of the competitive procurement process.

VI. Conclusion

The Competition in Contracting Act builds on the existing statutes to enhance the use of competition in government contracting and to restrict sole-source procurement to only those cases where it is truly required. While it is important to recognize that, in some

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cases, the Defense Department and civilian agencies cannot contract competitively, the Committee found that agencies routinely award sole-source contracts for property or services when competition was available. The Committee strongly believes that S. 338 addresses this problem and sets forth a workable solution.

VII. Section-by-Section Analysis

SHORT TITLE

The short title of this bill is the Competition in Contracting Act of 1983.

TITLE I: AMENDMENTS TO THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949 (41 U.S.C. § 251 ET. SEQ.)

I. Competition requirements

A. Competitive procedures

Section 101 amends section 303 of the Federal Property and Administrative Services Act (41 U.S.C. § 253) by striking the requirements for formal advertising and inserting the following requirements for using competitive procedures to obtain effective competition.

Section 303(a), as amended, establishes as congressional policy that competitive procedures are required to be used whenever possible in awarding federal contracts for property or services. Executive agencies would be permitted to invite sealed bids and make award without discussion (formal advertising) or request competitive proposals and make award with discussion (competitive negotiation), whichever is more conducive to the conditions of the contract.

Section 303(a) facilitates the use of competitive procedures by requiring that executive agencies utilize advance procurement planning and market research. Agencies would also be required to specify their needs and solicit bids, proposals, or quotations in such a manner as is necessary to obtain effective competition.

Section 303(b) authorizes the use of dual-sourcing when it would increase competition and likely result in the reduction of overall costs, or when it would be in the interest of industrial mobilization in the event of a national emergency.

Section 303(c) provides a basis in statute for establishing simplified procedures and forms for small purchases. A dollar ceiling of $25,000 for small purchases is set in section 309(e).

Section 303(d) establishes criteria, for other than small purchases, to determine which competitive procedure—sealed bid or competitive proposal—would be most appropriate for the procurement. Subsection 303(d)(1) directs an agency to use sealed bids when (1) there is sufficient time, (2) the evaluation factors can be assessed objectively, (3) discussions are not necessary, and (4) there is a reasonable expectation that more than one sealed bid will be submitted. Subsection 303(d)(2) establishes that competitive proposals will be used as the method of acquisition when the criteria for sealed bid procedures are not met.

B. Noncompetitive procedures

Section 101 further amends section 303 by adding new provisions that would make the award of a noncompetitive contract a clear violation of statute unless permitted under one of the prescribed exceptions. Section 303(e) provides six exceptions to competitive procedures which permit executive agencies to use noncompetitive procedures in awarding a contract.

Subsection 303(e)(1) establishes as the first exception that executive agencies are permitted to use noncompetitive procedures when the property or services needed by the government are available only from a single source and no competitive alternatives are available. This exception requires that the agency's purpose in undertaking a sole-source procurement is to satisfy its minimum needs.

The second exception (subsection 303(e)(2)) covers situations in which the agency's need for the property or services is of such unusual and compelling urgency that the government would be seriously injured by the delay involved in using competitive procedures.

The third exception (subsection 303(e)(3)) permits the use of noncompetitive procedures when it is necessary to award a contract to a particular source in order to achieve an essential industrial capability in the United States or to maintain national industrial mobilization.

The fourth exception (subsection 303(e)(4)) allows noncompetitive procedures to be used when required by international agreement or directed procurements for foreign governments when the cost is to be reimbursed by the foreign government.

The fifth exception (subsection 303(e)(5)) permits noncompetitive procedures to be used when a statute provides that the procurement must be obtained through a specified source.

The sixth exception (subsection 303(e)(6)) allows a noncompetitive procurement when disclosure to more than one source of the property or sources to be obtained would compromise the national security.

Section 303(f) precludes award on a noncompetitive basis unless (1) in the case of contracts over $25,000, the agency publishes a notice of the prospective award in the Commerce Business Daily and considers all submissions received in response to such a notice, and (2) in the case of contracts over $100,000, the use of such noncompetitive procedures is approved either by the head of the procuring activity or his or her designee, provided it is someone at a level higher than the contracting officer.

II. Definitions

Section 101 amends the Federal Property and Administrative Services Act (FPASA) by adding at the end of section 309 (41 U.S.C. § 259) the following new definitions.

"Executive agency" is defined in section 309(b) to include all government departments and establishments except for those military departments specified in the Armed Services Procurement Act (10 U.S.C. § 2303(a)).

"Competitive procedures" is defined in section 309(c) to mean those procedures under which an executive agency enters into a

contract after soliciting sealed bids or competitive proposals from more than one source that is capable of satisfying the agency's needs. "Noncompetitive procedures" is defined in section 309(d) to include procedures other than competitive.

"Small purchase" is defined in section 309(e) as any purchase or contract which does not exceed $25,000. Section 309(e) precludes agencies from dividing a proposed purchase into several smaller procurements for the purpose of using small purchase procedures.

III. Solicitation requirements

Section 101 amends the FPASA by adding after section 310 (41 U.S.C. § 260) the solicitation requirements for civilian procurements.

Section 311(a) establishes standards for drafting specifications. Executive agencies would be required to state their purchase specifications, which serve as the baseline for the evaluation of offers, in a manner which would permit effective competition. A second standard requires that agencies only include restrictive provisions or conditions in specifications to the extent necessary to meet their minimum needs.

Depending on the agency's needs and the market available to meet them, section 311(a) permits agencies to state their specifications in terms of functional, performance, or detailed design requirements.

Subsection 311(b)(1) requires agencies to include in their solicitations for sealed bids and competitive proposals, in addition to a description of their needs, a list of the evaluation factors—including price—which are reasonably expected to have a significant bearing on the selection for award. Agencies also are required to indicate the relative order of importance of these factors in the evaluation process.

Subsections 311(b)(2) and (3) require that agencies state in their solicitations how they intend to evaluate and award submissions—either with or without discussions. In the case of sealed bids, the statement includes information on the time and place for the opening of bids; for competitive proposals, the statement includes the time and the place for the submission of proposals.

IV. Evaluation and award

Section 101 amends the FPASA by adding section 312 which establishes evaluation and award procedures for sealed bids and competitive proposals.

Section 312(a) requires that executive agencies evaluate sealed bids and competitive proposals based on the factors specified in the solicitation. Section 312(b) permits the agency head to reject all bids and proposals which are not in the public interest.

A. Sealed bid procedures

Section 312(c) sets forth the evalution and award procedures for sealed bids. This section adopts provisions from the "Formal Advertising Requirements" section of current law (41 U.S.C. § 253). Sealed bids would be opened publicly at the time and place specified in the solicitation and would be evaluated without discussions with the bidders. In accordance with present procedures, further-

more, contracts would be awarded to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the government, price and other factors (included in the solicitation) considered.

B. Competitive proposal procedures

Section 312(d) establishes a framework for the conduct of competitive negotiations. Executive agencies would be permitted to discuss their requirements or the terms and conditions of the proposed contract with offerors after receipt of proposals and prior to the award of the contract. This section adopts provisions from the Armed Services Procurement Act (10 U.S.C. § 2304(g)), which require that military agencies conduct written or oral discussions with all responsible offerors in the competitive range, and extends it to apply to civilian procurements. The "competitive range" would be determined by the contracting officer based on price, technical, and other salient factors, and would include all proposals which have a reasonable change of being selected for award.

Section 312(d) also provides that proposals need not be evaluated with discussions where it can be demonstrated from either the existence of effective competition or accurate prior cost experience that the acceptance of a proposal without discussion would result in fair and reasonable prices. If discussions are not held, the solicitation must have notified all offerors of the possibility that award could be made without discussions.

Award of the contract under section 312(d) would be made to the responsible offeror whose proposal is most advantageous to the government on the basis of price and other factors included in the solicitation. Agencies would be required to notify all offerors of the rejection of their proposals, at the time of rejection, and award the contract by giving notice to the responsible offeror.

Section 312(e) states that the head of an executive agency is authorized to refer any sealed bid he or she considers to be in violation of the antitrust laws to the Attorney General.

V. Procurement notice

Subsection 313(a)(1) requires executive agencies to furnish pre- and post-award notices of competitive and noncompetitive contracts over $10,000 to be published by the Secretary of Commerce. Subsection 313(a)(2) requires the Secretary to publish such notices promptly in the Commerce Business Daily.

Subsection 313(a)(3) sets forth the guidelines for publicizing pre-award notices. Agencies are prohibited from (1) issuing a solicitation unless a notice of such solicitation has been published in the CBD for at least 15 days, and (2) establishing a deadline for submission of bids and proposals that is earlier than 30 days since the solicitation has been issued.

Section 313(b) specifies the information which is to be included in each pre-award notice: (1) a description of the property or services needed by the agency, which as in the case of the purchase specification, should not be unnecessarily restrictive, (2) the name and address of the contracting officer, (3) a statement that all submissions will be considered by the agency, and (4) in the case of noncompeti-

tive procurements, the justification for going sole source and the identification of the intended source.

Section 313(c) provides exceptions to the procurement notice requirement. Classified procurements in which disclosure of the agency's needs would compromise the national security would be excluded from both the pre- and post-award notice requirements. Exceptions two through five for non-competitive procedures (subsections 303(e) (2)–(5)) would apply to the pre-award notice requirement. The last exception includes procurements in which the head of the agency determines, with the concurrence of the Administrator of the Small Business Administration, that it is not appropriate or reasonable to publish a pre-award notice.

VI. Record requirements

Section 314(a) strengthens the recording requirement for civilian procurements. Executive agencies would be required to establish and maintain a record, by fiscal year, of the procurements in which noncompetitive procedures were used. Section 314(b) specifies that the information in the record shall include the name of the contractor who received the sole-source award, the property or services obtained, the dollar value, the reason for using noncompetitive procedures (pursuant to one of the six exceptions), and the position of the person or persons who required and approved the sole-source award. Agencies would also be required under section 314(a) to establish and maintain a record, by fiscal year, of all one-bid and one-proposal procurements in which competitive procedures were used. Records would be maintained for five years.

Section 314(c) requires that the information included in the records be transmitted to the Federal Procurement Data Center, which was established by the Office of Federal Procurement Policy Act (41 U.S.C. § 405(d)(5)).

VII. Cost and pricing data

Section 102 amends section 304 of the FPASA (41 U.S.C. § 254) by adding the following provision for cost and pricing data.

Section 304(d), as adopted from the Armed Services Procurement Act (10 U.S.C. § 2306(f)), requires executive agencies to submit cost or pricing data and certify that the data provided are accurate, complete, and current for negotiated contracts over $100,000. Certified cost or pricing data also would be required for modification to contracts, subcontracts, and modifications to subcontracts in which the price (or price adjustment in the case of modifications) is expected to exceed $100,000.

Subsection 304(d)(2) gives the executive agency the right to adjust contract prices in order to compensate for information which was found to be incomplete, inaccurate, or out of date, and which resulted in a higher price, fee, or cost than otherwise would have occurred. In order to verify that the cost or pricing data submitted are accurate, complete, and current, subsection 304(d)(3) permits any authorized representative of the head of the agency to examine the contractor's books, records, and documents related to the contract. Subsection 304(d)(4) waives the requirements of subsection 304(d)(1) in those circumstances where negotiated contract price is

based on adequate price competition, catalog or market prices, or is set by law.

VIII. Conforming amendments

Section 103 amends the FPASA to conform to the new procedures and terminology provided in this Act.

Subsection 103(a)(1) amends section 302 (41 U.S.C. § 252) by removing the statutory preference for formal advertising and the 15 exceptions for negotiation. In its place, section 303, as amended, places competitive negotiation on par with formal advertising—competitive procedures—and provides exceptions to justify noncompetitive procedures.

Subsection 103(a)(2) amends section 304 (41 U.S.C. § 254) by changing the heading from "Negotiated Contracts—Requirements" to "Contract Requirements." Subsection 103(a)(3) further amends this section by replacing all references to negotiated contracts with the phrase "[contracts] awarded using other than sealed bids procedures" to include competitively and noncompetitively negotiated contracts.

Subsection 103(a)(4) amends section 307 (41 U.S.C. § 257) by eliminating the requirement that a determination to negotiate contracts shall be based on a written finding by the contracting officer making the determination.

Subsections 103(a) (5) and (6) amend sections 308 (41 U.S.C. § 258) and 310 (41 U.S.C. § 260) respectively by making conforming changes to language.

TITLE II: AMENDMENTS TO THE ARMED SERVICES PROCUREMENT ACT OF 1947 (10 U.S.C. § 2301 ET. SEQ.)

The amendments to the Armed Services Procurement Act (ASPA) parallel those amendments set forth in Title I to the Federal Property and Administrative Services Act.

I. Definitions

Section 201 amends section 2302 of the ASPA by adding the following new definitions:

Section 2302(1), as amended, extends the definition of "head of an agency" to include the Secretary, Deputy Secretary, Under Secretary, and Assistant Secretary of Defense. The definitions for "negotiate" and "formal advertising" provided in sections 2302 (2) and (3) are deleted. Definitions for "competitive procedures," "noncompetitive procedures," and "small purchase," as provided in Title I, are added.

II. Competition requirements

A Competitive procedures

Section 201 amends section 2304 of the ASPA by removing the statutory preference for formal advertising and inserting requirements for competitive procedures.

Section 2304(a), as amended, establishes that competitive procedures are required to be used whenever possible in awarding federal contracts for property or services.

Section 2304(b) authorizes the use of dual-sourcing when it would increase competition, or when it would be in the interest of industrial mobilization.

Sections 2304 (c) and (d) establish regulations for small purchases and criteria for using competitive procedures.

B. Noncompetitive procedures

Section 2304(e) sets forth six exceptions to competitive procedures which permit executive agencies to use noncompetitive procedures in awarding a contract.

Section 2304(f) precludes award on a noncompetitive basis unless (1) in the case of contracts over $25,000, the agency publishes a notice of the prospective award in the Commerce Business Daily and considers all submissions received in response to such a notice, and (2) in the case of contracts over $100,000, the use of such noncompetitive procedures is approved either by the head of the procuring activity or his or her designee, provided it is someone at a level higher than the contracting officer.

III. Solicitation requirements

Section 201 amends section 2305 to establish the solicitation requirements for military procurements.

Section 2305(a), as amended, sets forth the solicitation requirements for sealed bids and competitive proposals, which include specification development.

IV. Evaluation and award

Section 2305(b) establishes the evaluation and award procedures for sealed bids and competitive proposals.

V. Procurement notice

Section 2305(c) requires agencies to publicize pre- and post-award notices of competitive and noncompetitive contracts over $10,000 in the Commerce Business Daily.

VI. Record requirement

Section 201 amends the ASPA by adding after section 2315 the recording requirement for military procurements.

VII. Conforming amendments

Section 202 amends section 2306 by making conforming language changes. In addition the dollar threshold for requiring contractors to submit certified cost or pricing data for contracts awarded using other than sealed bid procedures is lowered from $500,000 to $100,000.

Section 2310 is amended to eliminate the requirement that a determination to negotiate contracts shall be based on a written finding by the contracting officer making the determination.

TITLE III: ADVOCATE FOR COMPETITION

I. Definition

Section 301 defines "executive agency" as an executive department, a military department, and an independent establishment.

This is presently the definition provided in section 4(a) of the OFPP Act (41 U.S.C. § 403(a)).

II. Advocate for competition

Subsection 302(a)(1) establishes an advocate for competition in each executive agency. Subsection 302(a)(2) requires that the head of the agency designate an existing officer or employer of the agency as the advocate, relieve him or her from any conflicting duties and responsibilities, and provide the advocate with adequate staff.

Section 302(b) provides the advocate's responsibilities. Subsection 302(b)(1) states that the advocate's primary responsibility is to promote competition in the procurement of property and services. Specific responsibilities, listed in subsection 302(b)(2), include: reviewing the contracting activities of the agency, identifying and reporting to the head of the agency opportunities to achieve competition and conditions which could potentially be restrictive of competition, and issuing an annual report to the head of the agency on his or her activities.

III. Annual report

Section 303 requires that the head of an agency transmit to the Senate Committee on Governmental Affairs and the House Committee on Government Operations an annual report of the actions to be taken by the agency to increase the use of competitive contracting and a summary of actions taken in the past year. The report is to be issued no later than September 30 of each year, for fiscal years 1983 through 1986.

TITLE IV: APPLICABILITY

Section 401 states that the amendments set forth in the Titles are to apply to civilian and military contracts entered into 180 days after the bill is enacted.

VIII. Estimated Cost of Legislation

U.S. Congress,
Congressional Budget Office,
Washington, D.C., March 23, 1983.

Hon. William V. Roth, Jr.,
Chairman, Committee on Governmental Affairs, U.S. Senate, Dirksen Senate Office Building, Washington, D.C.

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 338, the Competition in Contracting Act of 1983, as ordered reported by the Senate Committee on Government Affairs, March 17, 1983.

The bill revises procedures for awarding federal contracts for property and services, with the intent of increasing competition in government procurement. The potential savings from effective implementation of this legislation are substantial, but cannot be estimated with precision. Of $123 billion in contracts over $10,000 awarded in fiscal year 1981, $67 billion (54 percent) were awarded noncompetitively, with over 80 percent of these noncompetitive

awards made by the Department of Defense. About $46 billion of the $67 billion in noncompetitive contracts awarded in fiscal year 1981 were for actions under existing contracts, and approximately $6 billion of the remainder were for procurements under the "Buy Indian" program and for follow-on awards after competition—leaving about $15 billion in other new contract actions.

Similar detailed data for 1982 procurements have not yet been compiled. Overall, contracts over $10,000 awarded in fiscal year 1982 totaled increased by about 20 percent, to $147 billion. Those awarded noncompetitively increased by about 18 percent, from $67 billion in 1981 to $79 billion in 1982. If the distribution of these contracts between actions under existing contracts, new contract actions, "Buy Indian" and follow-on awards was approximately the same in fiscal year 1982 as it was in 1981, then new contract actions not subject to the constraints of follow-on awards or the "Buy Indian" program would be valued at about $18 billion in 1982, and would be expected to be even larger in fiscal year 1983 and future years.

Studies by the General Accounting Office and others have indicated that savings of 10 to 50 percent can sometimes be achieved through competitive contracting. While there is no reliable methodology available to estimate total savings from the bill, such savings could be significant, because each 1 percent saved on new contract actions would save close to $200 million per year. Also, in the long term, the costs of modifications to existing contracts may also be reduced by the prospects of future competition.

Additional savings may be achieved by reducing, from $500,000 to $100,000, the threshold value of negotiated defense contracts above which cost and pricing data must be certified by the contractor. This will make the defense threshold consistent with the threshold for civilian contracts included in the Federal Procurement Regulations. The savings could result from additional assessments for contract violations, though additional audits would be required to identify such violations. The magnitude of receipts cannot be estimated and would depend on both the discovery of additional violations and the extent to which the Department of Defense increased its auditing effort.

The bill also requires the head of each executive agency to submit annual reports to the Congress in each fiscal year from 1983 through 1986. These reports will summarize actions taken to increase competition during the previous year and will outline plans for the future. The costs of producing these reports are not expected to be significant.

Enactment of this bill would not affect the budgets of state and local governments.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

JAMES BLUM,
(For Alice M. Rivlin, Director).

IX. Evaluation of Regulatory Impact

Pursuant to the requirements of paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory and paperwork impact of S. 338.

In fiscal 1982, the federal government initiated over 18.8 million contract actions, involving approximately 125,000 contractors. The objectives of S. 338 are to make the procurement process more effective, efficient, and competitive and thus to encourage more contractors to do business with the federal government.

S. 338 establishes a new statutory framework which places competitive negotiation on par with formal advertising and imposes new restrictions on the use of sole-source contracting. Within this new framework, the evaluation and award procedures remain the same as those provided in present law. In this regard, no substantive regulatory modifications will be required for implementation. Other provisions of S. 338, however, will alter current regulatory and paperwork requirements. The legislation eliminates the need for a time-consuming "determinations and finding" statement that agencies now must provide to justify the use of negotiation. This change will substantially reduce the administrative burden agencies currently face when they competitively negotiate contracts.

To facilitate oversight of noncompetitive contracts, S. 338 requires agencies to maintain a record, by fiscal year, identifying all sole-source procurements. In addition, the advocate for competition in each procuring agency is responsible for reporting the opportunities to achieve competition and the conditions which could potentially be restrictive of competition. These new recording and reporting requirements will allow the Congress, the Office of Federal Procurement Policy, and senior agency officials to evaluate the progress of each agency in increasing the use of competitive contracting.

The Committee also determined that S. 338 will have no significant impact on the privacy of individuals or firms which do business with the federal government.

X. Rollcall Vote in Committee

In compliance with paragraph 7(c) of Rule XXVI of the Standing Rules of the Senate, the rollcall vote taken during Committee consideration of this legislation is as follows:

Final passage: Ordered reported, 10 yeas; 0 nays.

YEAS (10)	NAYS (0)
Percy	
Stevens	
Cohen	
Durenberger	
Rudman	
Cochran	
Eagleton	
Sasser	
Levin	
Roth	

XI. Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 41—PUBLIC CONTRACTS

* * * * * * *

SUBCHAPTER IV—PROCUREMENT PROVISIONS

§ 251. Declaration of purpose of this subchapter

The purpose of this subchapter is to facilitate the procurement of property and services.

§ 252. Purchases and contracts for property

(a) Applicability of subchapter; delegation of authority

Executive agencies shall make purchases and contracts for property and services in accordance with the provisions of this subchapter and implementing regulations of the Administrator; but this subchapter does not apply—

(1) to the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration; or

(2) when this subchapter is made inapplicable pursuant to section 474 of title 40 or any other law, but when this subchapter is made inapplicable by any such provision of law, sections 5 and 8 of this title shall be applicable in the absence of authority conferred by statute to procure without advertising or without regard to said section 5 of this title.

(b) Small business concerns; share of business; advance publicity on negotiated purchases and contracts for property

It is declared policy of the Congress that a fair proportion of the total purchases and contracts for property and services for the Government shall be placed with small business concerns. [Whenever it is proposed to make a contract or purchase in excess of $10,000 by negotiation and without advertising, pursuant to the authority of paragraph (7) or (8) of subsection (c) of this section, suitable advance publicity, as determined by the agency head with due regard to the type of property involved and other relevant considerations, shall be given for a period of at least fifteen days, wherever practicable, as determined by the agency head.

[(c) Negotiated purchases and contracts for property; conditions

[All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—

[(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;

[(2) the public exigency will not admit of the delay incident to advertising;

[(3) the aggregate amount involved does not exceed $10,000;

[(4) for personal or professional services;

[(5) for any service to be rendered by any university, college, or other educational institution;

[(6) the property or services are to be procured and used outside the limits of the United States and its possessions;

[(7) for medicines or medical property;

[(8) for property purchased for authorized resale;

[(9) for perishable or nonperishable subsistence supplies;

[(10) for property or services for which it is impracticable to secure competition;

[(11) the agency head determines that the purchase or contract is for experimental, developmental, or research work, or for the manufacture or furnishing of property for experimentation, development, research, or test;

[(12) for property or services as to which the agency head determines that the character, ingredients, or component thereof are such that the purchase or contract should not be publicly disclosed;

[(13) for equipment which the agency head determines to be technical equipment, and as to which he determines that the procurement thereof without advertising is necessary in special situations or in particular localities in order to assure standardization of equipment and interchangeability of parts and that such standardization and interchangeability is necessary in the public interest;

[(14) for property or services as to which the agency head determines that bid prices after advertising therefor are not reasonable (either as to all or as to some part of the requirements) or have not been independently arrived at in open competition: *Provided,* That no negotiated purchase or contract may be entered into under this paragraph after the rejection of all or some of the bids received unless (A) notification of the intention to negotiate and reasonable opportunity to negotiate shall have been given by the agency head to each responsible bidder and (B) the negotiated price is the lowest negotiated price offered by any responsible supplier; or

[(15) otherwise authorized by law, except that section 254 of this title shall apply to purchases and contracts made without advertising under this paragraph.

[(d) Bids in violation of antitrust laws

[If in the opinion of the agency head bids received after advertising evidence any violation of the antitrust laws he shall refer such bids to the Attorney General for appropriate action.]

[(e)] ***(c)*** **Exceptions to section**

This section shall not be construed to (A) authorize the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items to be

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negotiated without advertising as required by section 253 of this title, unless such contract is to be performed outside the continental United States or unless negotiation of such contract is authorized by the provisions of paragraphs (1), (2), (3), (10), (11), (12), or (14) of subsection (c) of this section.

[(f)] *(d)* Carriage of cargo; specification of container size

No contract for the carriage of Government property in other than Government-owned cargo containers shall require carriage of such property in cargo containers of any stated length, height, or width.

§ 253. [Advertising requirements] *Competition requirements*

[Whenever advertising is required—

[(a) The advertisement for bids shall be made a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of property and services necessary to meet the requirements of the agency concerned. No advertisement or invitation to bid for the carriage of Government property in other than Government-owned cargo containers shall specify carriage of such property in cargo containers of any stated length, height, or width.

[(b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided,* That all bids may be rejected when the agency head determines that it is in the public interest so to do.]

(a) Except as provided in subsection (e) or otherwise provided by law, executive agencies shall use competitive procedures in making contracts for property and services. Executive agencies shall use advance procurement planning and market research and shall prepare specifications in such a manner as is necessary to obtain effective competition with due regard to the nature of the property or services to be acquired. Executive agencies shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement action and shall specify its needs and solicit bids, proposals, or quotations in a manner designed to achieve effective competition for the contract.

(b) An executive agency may award a contract under this title in the procurement of property or services in order to establish or maintain any alternative source or sources of supply of such property or services if the executive agency determines that to do so would (1) increase competition and would likely result in reduced overall costs for such procurement, or for any anticipated procurement, of such property or services, or (2) be in the interest of industrial mobilization in the case of a national emergency.

(c) Procurement regulations shall include special simplified procedures and forms for small purchases to facilitate making small purchases efficiently and economically.

(d) For other than small purchases, an executive agency, when using competitive procedures—

(1) shall solicit sealed bids when—

(A) time permits the solicitation, submission, and evaluation of sealed bids;

(B) the award will be made on the basis of price and other factors considered;

(C) it is not necessary to conduct discussions with the responding sources about their bids; and

(D) there is a reasonable expectation of receiving more than one sealed bid;

(2) shall request competitive proposals when sealed bids are not required under clause (1) of this subsection.

(e) An executive agency may use noncompetitive procedures only when—

(1) the property and services needed by the Government are available from only one source and no other type of property or services will satisfy the needs of the executive agency;

(2) the executive agency's need for the property or services is of such unusual and compelling urgency that the Government would be seriously injured by the delay involved in using competitive procedures;

(3) it is necessary to award the contract to a particular source or sources in order to maintain an essential industrial capability in the United States or to achieve national industrial mobilization;

(4) the terms of any international agreement or treaty between the United States and a foreign government, or the directions of any foreign government reimbursing the executive agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of noncompetitive procedures;

(5) a statute provides that the procurement be made through another executive agency or a specified source; or

(6) the disclosure of the executive agency's needs to more than one source would compromise the national security.

(f) An executive agency may not award a contract using noncompetitive procedures unless—

(1) in the case of any contract other than a small purchase, a notice has been published with respect to such contract pursuant to section 263 and all bids, proposals, and quotations received in response to such notice have been considered by such executive agency; and

(2) in the case of any contract exceeding $100,000, the use of such procedures is approved by the head of the organizational element of such executive agency which has the responsibility to enter into such contract or by a designee of the head of such organizational element who is higher in such organizational element than the contracting officer issuing the solicitation with respect to such contract.

§ 254. [Negotiated contracts] *Contract requirements*

(a) Requirements

Except as provided in subsection (b) of this section, contracts [negotiated pursuant to section 252(c)] *awarded after using other than sealed bid procedures* of this title may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract [negotiated pursuant to section 252(c)] *awarded after using other than sealed bid procedures* of this title shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purposes of securing business for the breach or violation of which warranty the Government shall have the right to annual such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

(b) Barred contracts; fee limitation; determination of use; advance notification

The cost-plus-a-percentage-of-cost system of contracting shall not be used, and in the case of a cost-plus-a-fixed-fee contract the fee shall not exceed 10 per centum of the estimated cost of the contract, exclusive of the fee, as determined by the head at the time of entering into such contract (except that a fee not in excess of 15 per centum of such estimated cost is authorized in any such contract for experimental, developmental, or research work and that a fee inclusive of the contractor's costs and not in excess of 6 per centum of the estimated cost, exclusive of fees, as determined by the agency head at the time of entering into the contract, of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public works or utility project). Neither a cost nor a cost-plus-a-fixed-fee contract nor an incentive-type contract shall be used unless the agency head determines that such method of contracting is likely to be less costly than other methods or that it is impractical to secure property or services of the kind or quality required without the use of a cost or cost-plus-a-fixed-fee contract or an incentive-type contract. All cost and cost-plus-a fixed-fee contracts shall provide for advance notification by the contractor to the procuring agency of any subcontract thereunder on a cost-plus-a-fixed-fee basis and of any fixed-price subcontract or purchase order which exceeds in dollar amount either $25,000 or 5 per centum of the total estimated cost of the prime contract; and a procuring agency, through any authorized representative thereof, shall have the right to inspect the plans and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a cost or cost-plus-a-fixed-fee contract.

(c) Examination of books, records, etc., of contractors; time limitation; exemptions; exceptional conditions; reports to Congress

All contracts [negotiated without advertising pursuant to authority contained in this Act] *awarded after using other than sealed bid procedures* shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts. Under regulations to be prescribed by the Administrator, however, such clause may be omitted from contracts with foreign contractors or foreign subcontractors if the agency head determines, with the concurrence of the Comptroller General of the United States or his designee, that the omission will serve the best interests of the United States. However, the concurrence of the Comptroller General of the United States or his designee is not required for the omission of such clause—

(1) where the contractor or subcontractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its books, documents, papers, or records available for examination; and

(2) where the agency head determines, after taking into account the price and availability of the property or services from United States sources, that the public interest would be best served by the omission of the clause.

If the clause is omitted based on a determination under clause (2) a written report shall be furnished to the Congress. The power of the agency head to make the determination specified in the preceding sentences shall not be delegable.

(d)(1) A prime contractor or any subcontractor shall be required to submit cost or pricing data under the circumstances listed below, and shall be required to certify that, to the best of his knowledge and belief, the cost or pricing data he submitted was accurate, complete, and current—

(A) prior to the award of any prime contract under this title using other than sealed bid procedures where the price is expected to exceed $100,000;

(B) prior to the pricing of any contract change or modification for which the price adjustment is expected to exceed $100,000, or such lesser amount as may be prescribed by the head of the agency;

(C) prior to the award of a subcontract at any tier, where the prime contractor and each higher tier subcontractor have been required to furnish such a certificate, if the price of such subcontract is expected to exceed $100,000; or

(D) prior to the pricing of any contract change or modification to a subcontract covered by clause (C), for which the price adjustment is expected to exceed $100,000, or such lesser amount as may be prescribed by the head of the agency.

(2) Any prime contract or change or modification thereto under which a certificate is required under paragraph (1) shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by which it may be determined by the executive agency that such price was increased because the contractor or any subcontractor required to furnish such a certificate, furnished cost or pricing data which, as of a date agreed upon between the parties (which date shall be as close to the date of agreement on the price as is practicable), was inaccurate, incomplete, or noncurrent.

(3) For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this subsection, any authorized representative of the head of the agency who is an employee of the United States Government shall have the right, until the expiration of three years after final payment under the contract or subcontract, to examine all books, records, documents and other data of the contractor or subcontractor related to the proposal for the contract, the discussions conducted on the proposal under this chapter, pricing, or performance of the contract or subcontract.

(4) The requirements of this subsection need not be applied to contracts or subcontracts where the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, prices set by law or regulation or, in exceptional cases where the head of the executive agency determines that the requirements of this subsection may be waived and states in writing his reasons for such determination.

§ 255. Advance or other payments

(a) Conditions

Any executive agency may—

(1) make advance, partial progress or other payments under contracts for property or services made by the agency; and

(2) insert in bid solicitations for procurement of property or services a provision limiting to small business concerns advance or progress payments.

(b) Amount

Payments made under subsection (a) of this section may not exceed the unpaid contract price.

(c) Security

Advance payments under subsection (a) of this section may be made only upon adequate security and a determination by the agency head that to do so would be in the public interest. Such security may be in the form of a lien in favor of the Government on the property contracted for, on the balance in an account in which such payments are deposited, and on such of the property acquired for performance of the contract as the parties may agree. This lien shall be paramount to all other liens.

§ 256a. Waiver of liquidated damages

Whenever any contract made on behalf of the Government by the head of any Federal Agency, or by officers authorized by him so to do, includes a provision for liquidated damages for delay, the Comptroller General upon recommendation of such head is authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable.

§ 257. Administrative determinations

(a) Conclusiveness; delegation of powers

The determinations and decisions provided in this subchapter to be made by the Administrator or other agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. **[**Except as provided in subsection (b) of this section, and except**]** *Except* as provided in section 486(d) of title 40 with respect to the Administrator, the agency head is authorized to delegate his powers provided by this subchapter, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the agency.

[(b) Nondelegable powers; powers delegable to certain persons

[The power of the agency head to make the determinations or decisions specified in paragraphs (12) and (13) of section 252(c) of this title shall not be delegable, and the power to make the determinations or decisions specified in paragraph (11) of section 252(c) of this title shall be delegable only to a chief officer responsible for procurement and only with respect to contracts which will not require the expenditure of more than $25,000.**]**

[(c)] ***(b)*** **Basis of determinations; finding conclusive; preservation of findings; copy**

Each determination or decision required **[**by paragraphs (11), (12), (13), or (14) of section 252(c),**]** by section 254 or by section 255(c) of this title shall be based upon written findings made by the official making such determination, which findings shall be final and shall be available within the agency for a period of at least six years following the date of the determination. A copy of the findings shall be submitted to the General Accounting Office with the contract.

[(d) Preservation of data

[In any case where any purchase or contract is negotiated pursuant to the provisions of section 252(c) of this title, except in a case covered by paragraphs (2), (3), (4), (5), or (6) of section 252(c) of this title, the data with respect to the negotiation shall be preserved in the files of the agency for a period of six years following final payment of such contract.**]**

§ 258. Laws applicable to contracts

No purchase or contract shall be exempt from sections 35 to 45 of this title, or from sections 276a to 276a–5 of title 40, solely by

reason of having been [entered into pursuant to section 252(c) of this title without advertising,] *made or awarded after using other than sealed bid procedures* and the provisions of sections 276a to 276a–5, 324, and 325a of title 40 and sections 35 to 45 of this title, if otherwise applicable, shall apply to such purchases and contracts.

§ 259. Definitions

As used in this subchapter—

(a) The term "agency head" shall mean the head or any assistant head of any executive agency, and may at the option of the Administrator include the chief official of any principal organizational unit of the General Services Administration.

(b) The term "executive agency" has the same meaning as provided in section 4(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(a)), except that such term does not include the departments or establishments specified in section 2303(a) of title 10, United States Code.

(c) The term "competitive procedures" means procedures under which an executive agency enters into a contract after soliciting sealed bids or competitive proposals from more than one source that is capable of satisfying the needs of the executive agency.

(d) The term "noncompetitive procedures" means procedures other than competitive procedures.

(e) The term "small purchase" means any purchase or contract which does not exceed $25,000. A proposed procurement shall not be divided into several procurements primarily for the purpose of using the small purchase procedures.

§ 260. Laws not applicable to contracts

Sections 5, 8, and 13 of this title shall not apply to the procurement of property or services made by an executive agency pursuant to this subchapter. Any provision of law which authorizes an executive agency (other than an executive agency which is exempted from the provisions of this subchapter by section 252(a) of this title), to procure any property or services without advertising or without regard to said section 5 of this title shall be construed to authorize the procurement of such property or services pursuant to [section 252(c)(15) of this title without regard to the advertising requirements of sections 252(c) and 253 of this title.] *the provisions of this title relating to other than sealed bid procedures.*

§ 261. Solicitation requirements

(a)(1) Each solicitation under this title shall include specifications which—

(A) consistent with the needs of the executive agency, permit effective competition; and

(B) include restrictive provisions or conditions only to the extent necessary to satisfy such needs or as authorized by law.

(2) For the purposes of paragraph (1), the type of specification included in any solicitation shall depend on the nature of the needs of the executive agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of—

(A) function so that a variety of products or services may qualify;

(B) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or

(C) design requirements.

(b) Each solicitation for sealed bids or competitive proposals other than for small purchases shall include, in addition to the specifications described in subsection (a)—

(1) a statement of—

(A) all significant factors, including price, which the executive agency reasonably expects to consider in evaluating sealed bids or competitive proposals; and

(B) the relative importance assigned to those factors;

(2) in the case of sealed bids—

(A) a statement that sealed bids will be evaluated without discussions with the bidders; and

(B) the time and place for the opening of the sealed bids; and

(3) in the case of competitive proposals—

(A) a statement that the proposals are intended to be evaluated with, and awards made after, discussions with the offerors but might be evaluated and awarded without discussions with the offerors; and

(B) the time and place for submission of proposals.

§ 262. Evaluation and award

(a) An executive agency shall evaluate sealed bids and competitive proposals based on the factors specified in the solicitation.

(b) All sealed bids or competitive proposals received in response to a solicitation may be rejected if the head of the executive agency determines that such action is in the public interest.

(c) Sealed bids shall be opened publicly at the time and place stated in the solicitation. The executive agency shall evaluate the bids without discussions with the bidders and shall, except as provided in subsection (b), award a contract with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, considering the price and the other factors included in the solicitation under section 261(b)(1). The award of a contract shall be made by transmitting written notice of the award to the successful bidder.

(d)(1) The executive agency shall evaluate competitive proposals and may award a contract—

(A) after discussions conducted with the offerors at any time after receipt of the proposals and prior to the award of the contract; or

(B) without discussions with the offerors beyond discussions conducted for the purpose of minor clarification.

(2) In the case of award of a contract under paragraph (1)(A), the executive agency shall conduct, before such award, written or oral discussions with all responsible offerors who submit proposals within a competitive range, price and other evaluation factors considered.

(3) In the case of award of a contract under paragraph (1)(B), the executive agency shall award the contract based on the proposals as received (and as clarified, if necessary, in discussions conducted for the purpose of minor clarification).

(4) The executive agency shall, except as otherwise provided in subsection (b), award a contract with reasonable promptness to the responsible offeror whose proposal is most advantageous to the United States, considering price and the other factors included in the solicitation under contract by giving notice of the award to such offeror and shall promptly notify all other offerors of the rejection of their proposals.

(e) If the head of an executive agency considers that any bid received under sealed bid procedures evidences a violation of the antitrust laws, he shall refer the bid to the Attorney General for appropriate action.

§ 263. Procurement notice

(a) (1) Except as provided in subsection (c)—

(A) an executive agency intending to solicit bids, proposals, or quotations for a contract for property or services at a price exceeding $10,000 shall furnish for publication by the Secretary of Commerce a notice described in subsection (b); and

(B) an executive agency awarding a contract for property or services at a price exceeding $10,000 shall furnish for publication by the Secretary of Commerce a notice announcing such award if there is likely to be any subcontract under such contract.

(2) The Secretary of Commerce shall publish promptly in the Commerce Business Daily each notice required by paragraph (1).

(3) Whenever an executive agency is required by paragraph (1)(A) to furnish a notice of a solicitation to the Secretary of Commerce, such executive agency may not—

(A) issue such solicitation earlier than fifteen days after the date on which such notice is published by the Secretary of Commerce; or

(B) establish a deadline for the submission of bids, proposals, or quotations in response to such solicitation that is earlier than thirty days after the date on which such solicitation is issued.

(b) Each notice required by subsection (a)(1)(A) shall include—

(1) a description of the property or services to be contracted for, which description is not unnecessarily restrictive of competition;

(2) the name and address of the officer or employee of the executive agency who may be contacted for the purpose of obtaining a copy of the solicitation;

(3) a statement that any person may submit a bid, proposal, or quotation which shall be considered by the executive agency; and

(4) in the case of a procurement using noncompetitive procedures, a statement of the reason justifying the use of noncompetitive procedures and the identity of the intended source.

(c)(1) A notice is not required under subsection (a)(1) if the notice would disclose the executive agency's needs and the disclosure of such needs would compromise the national security.

(2) The requirements of subsection (a)(1)(A) do not apply—

(A) to any procurement under conditions described in clause (2), (3), (4), or (5) of section 253(e); and

(B) in the case of any procurement for which the head of the executive agency carrying out such procurement makes a determination in writing, with the concurrence of the Administrator of the Small Business Administration, that it is not appropriate or reasonable to publish a notice before issuing a solicitation.

§ 264. Record requirements

(a) Each executive agency shall establish and maintain for a period of five years a record, by fiscal year, of the procurements, other than small purchases, in such fiscal year in which—

(1) noncompetitive procedures were used; and

(2) only one bid or proposal was received after competitive procedures were used.

(b) The record established under subsection (a) shall include, with respect to each procurement—

(1) information identifying the source to whom the contract was awarded;

(2) the property or services obtained by the Government under the procurement;

(3) the total cost of the procurement;

(4) the reason under section 253(e) for the use of noncompetitive procedures; and

(5) the position of the officers or employees of the executive agency who required and approved the use of noncompetitive procedures in such procurement.

(c) The information included in the record established and maintained under subsection (a) shall be transmitted to the Federal Procurement Data Center referred to in section 6(d)(5) of the Office of Federal Procurement Policy Act (41 U.S.C. 405(d)(5)).

TITLE 10—ARMED FORCES

* * * * * * *

CHAPTER 137—PROCUREMENT GENERALLY

* * * * * * *

Sec.
2301. Declaration of policy.
2302. Definitions.
2303. Applicability of chapter.
[2304. Purchases and contracts: formal advertising; exceptions.]
2304. Competition requirements.
[2305. Formal advertisements for bids; time; opening; award; rejection.]
2305. Solicitation, evaluation, and award procedures; notice requirements.
2306. Kinds of contracts.
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2309. Allocation of appropriations.
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2314. Laws inapplicable to agencies named in section 2303 of this title.
2315. Law inapplicable to the procurement of automatic data processing equipment and services for certain defense purposes.
2316. Record requirements.

* * * * * * *

§ 2301. Declaration of policy

(a)(1) The Congress finds that in order to ensure national defense preparedness, to conserve fiscal resources, and to enhance defense production capability, it is in the interest of the United States to acquire property and services for the Department of Defense in the most timely, economic, and efficient manner. It is therefore the policy of the Congress that services and property (including weapon systems and associated items) for the Department of Defense be acquired by any kind of contract, other than cost-plus-a-percentage-of-cost contracts, but including multiyear contracts, that will promote the interest of the United States. Further, it is the policy of the Congress that such contracts, when practicable, provide for the purchase of property at times and in quantities that will result in reduced costs to the Government and provide incentives to contractors to improve productivity through investment in capital facilities, equipment, and advanced technology.

(2) It is also the policy of the Congress that contracts for advanced procurement of components, parts, and materials necessary for manufacture or for logistics support of a weapon system should, if feasible and practicable, be entered into in a manner to achieve economic-lot purchases and more efficient production rates.

(b) It is also the policy of Congress that a fair proportion of the purchases and contracts made under this chapter be placed with small business concerns.

§ 2302. Definitions

In this chapter—

(1) "Head of an agency" means *The Secretary, any Deputy Secretary, any Under Secretary, or any Assistant Secretary of Defense;* the Secretary, the Under Secretary, or any Assistant Secretary, of the Army, Navy, or Air Force; the Secretary of Transportation; or the Administrator of the National Aeronautics and Space Administration.

[(2) "Negotiate" means make without formal advertising.

[(3) "Formal advertising" means advertising as prescribed by section 2305 of this title.]

(2) "Agency" means any department or establishment specified in section 2303 (a) of this title.

(3) "Competitive procedures" means procedures under which the head of an agency enters into a contract after soliciting sealed bids or competitive proposals from more than one source that is capable of satisfying the needs of the agency.

(4) "Noncompetitive procedures" means procedures other than competitive procedures.

(5) "Small purchase" means any purchase or contract which does not exceed $25,000. A proposed procurement shall not be

divided into several procurements primarily for the purpose of using small purchase procedures.

§ 2303. Applicability of chapter

(a) This chapter applies to the purchase, and contract to purchase, by any of the following agencies, for its use or otherwise, of all property named in subsection (b), and all services, for which payment is to be made from appropriated funds:

(1) The Department of Defense.

[1] *(2)* The Department of the Army.

[2] *(3)* The Department of the Navy.

[3] *(4)* The Department of the Air Force.

[4] *(5)* The Coast Guard.

[5] *(6)* The National Aeronautics and Space Administration.

(b) This chapter does not cover land. It covers all other property including—

(1) public works;
(2) buildings;
(3) facilities;
(4) vessels;
(5) floating equipment;
(6) aircraft;
(7) parts;
(8) accessories;
(9) equipment; and
(10) machine tools.

(c) The provisions of this chapter that apply to the procurement of property apply also to contracts for its installation or alteration.

[§ 2304. Purchases and contracts; formal advertising; exceptions

[(a) Purchase of and contracts for property or services covered by this chapter shall be made by formal advertising in all cases in which the use of such method is feasible and practicable under the existing conditions and circumstances. If use of such method is not feasible and practicable, the head of an agency, subject to the requirements for determinations and findings in section 2310, may negotiate such a purchase or contract, if—

[(1) it is determined that such action is necessary in the public interest during a national emergency declared by Congress or the President;

[(2) the public exigency will not permit the delay incident to advertising;

[(3) the aggregate amount involved is not more than $25,000;

[(4) the purchase or contract is for personal or professional services;

[(5) the purchase or contract is for any service by a university, college, or other educational institution;

[(6) the purchase or contract is for property or services to be procured and used outside the United States and the Territories, Commonwealths, and possessions;

[(7) the purchase or contract is for medicine or medical supplies;

[(8) the purchase or contract is for property for authorized resale;

[(9) the purchase or contract is for perishable or nonperishable subsistence supplies;

[(10) the purchase or contract is for property or services for which it is impracticable to obtain competition.

[(11) the purchase or contract is for property or services that he determines to be for experimental, developmental, or research work, or for making or furnishing property for experiment, test, development, or research;

[(12) the purchase or contract is for property or services whose procurement he determines should not be publicly disclosed because of their character, ingredients, or components;

[(13) the purchase or contract is for equipment that he determines to be technical equipment whose standardization and the interchangeability of whose parts are necessary in the public interest and whose procurement by negotiation is necessary to assure that standardization and interchangeability;

[(14) The purchase or contract is for technical or special property that he determines to require a substantial initial investment or an extended period of preparation for manufacture, and for which he determines that formal advertising would be likely to result in additional cost to the Government by reason of duplication of investment or would result in duplication of necessary preparation which would unduly delay the procurement of the property;

[(15) the purchase or contract is for property or services for which he determines that the bid prices received after formal advertising are unreasonable as to all or part of the requirements, or were not independently reached in open competition, and for which (A) he has notified each responsible bidder of intention to negotiate and give him reasonable opportunity to negotiate; (B) the negotiated price is lower than the lowest rejected bid of any responsible bidder, as determined by the head of the agency; and (C) the negotiated price is the lowest negotiated price offered by any responsible supplier;

[(16) he determines that (A) it is in the interest of national defense to have a plant, mine, or other facility, or a producer, manufacturer, or other supplier, available for furnishing property or services in case of a national emergency; or (B) the interest of industrial mobilization in case of such an emergency, or the interest of national defense in maintaining active engineering, research, and development, would otherwise be subserved; or

[(17) negotiation of the purchase or contract is otherwise authorized by law.

[(b) The data respecting the negotiation of each purchase or contract under clauses (1) and (7)–(17) of subsection (a) shall be kept by the contracting agency for six years after the date of final payment on the contract.

[(c) This section does not authorize—

[(1) the negotiation of a contract to construct or repair any building, road, sidewalk, sewer main, or similar item, unless—

[(A) It is made under clauses (1)–(3), (10)–(12), or (15) of subsection (a); or

[(B) it is to be performed outside the United States; or

[(2) the erection, repair, or funishing of any public building or public improvement.

[(d) Whenever the head of the agency determines it to be practicable, such advance publicity as he considers suitable with regard to the property involved and other relevant considerations shall be given for a period of at least 15 days before making a purchase of or contract for property, or a service, under clause (7) or (8) of subsection (a) involving more than $10,000.

[(e) A report shall be made to Congress, on May 19, and November 19 of each year, of the purchases and contracts made under clauses (11) and (16) of subsection (a) during the period since the date of the last report. The report shall—

[(1) name each contractor;

[(2) state the amount of each contract; and

[(3) describe, with consideration of the national security, the property and services covered by each contract.

[(f) For the purposes of the following laws, purchases or contracts negotiated under this section shall be treated as if they were made with formal advertising:

[(1) The Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes", approved June 30, 1936 (commonly referred to as the "Walsh-Healy Act") (41 U.S.C. 35–45).

[(2) The Act entitled "An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes", approved March 3, 1931 (commonly referred to as the "Davis-Bacon Act") (40 U.S.C. 276a–276a–5).

[(g) In all negotiated procurements in excess of $25,000 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, proposals, including price, shall be solicited fom the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered: *Provided, however,* That the requirements of the subsection with respect to written or oral discussions need not be applied to procurements in implementation of authorized set-aside programs or to procurements where it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product, that acceptance of an initial proposal without discussion would result in fair and reasonable prices and where the request for proposals notifies all offerors of the possibility that award may be made without discussion.

[(h) Except in a case where the Secretary of Defense determines that military requirements necessitate specification of container sizes, no contract for the carriage of Government property in other than Government-owned cargo containers shall require carriage of

such property in cargo containers of any stated length, height, or width.]

§ 2304. Competition requirements

(a) Except as provided in subsection (e) of this section or otherwise provided by law, the head of an agency shall use competitive procedures in making contracts for property and services. The head of an agency shall use advance procurement planning and market research and shall prepare specifications in such a manner as is necessary to obtain effective competition with due regard to the nature of the property or services to be acquired. The head of an agency shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement action and shall specify the needs of the agency and solicit bids, proposals, or quotations in a manner designed to achieve effective competition for the contract.

(b) The head of an agency may award a contract under this title in the procurement of property or services in order to establish or maintain any alternative source or sources of supply of such property or services if such head of an agency determines that to do so would (1) increase competition and would likely result in reduced overall costs for such procurement, or for any anticipated procurement, of such property or services, or (2) be in the interest of industrial mobilization in the case of a national emergency.

(c) Procurement regulations shall include special simplified procedures and forms for small purchases to facilitate making small purchases efficiently and economically.

(d) For other than small purchases, the head of an agency, when using competitive procedures—

(1) shall solicit sealed bids when—

(A) time permits the solicitation, submission, and evaluation of sealed bids;

(B) the award will be made on the basis of price and other factors considered;

(C) it is not necessary to conduct discussions with the responding sources about their bids; and

(D) there is reasonable expectation of receiving more than one sealed bid;

(2) shall request competitive proposals from responding sources when sealed bids are not required under clause (1) of this subsection.

(e) The head of an agency may use noncompetitive procedures only when—

(1) the property and services needed by the Government are available from only one source and no other type of property or services will satisfy the needs of the agency;

(2) the agency's need for the property or services is of such unusual and compelling urgency that the Government would be seriously injured by the delay involved in using competitive procedures;

(3) it is necessary to award the contract to a particular source or sources in order to maintain an essential industrial capability in the United States or to achieve national industrial mobilization;

(4) the terms of any international agreement or treaty between the United States Government and a foreign government, or the directions of any foreign government reimbursing the agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of noncompetitive procedures;

(5) a statute requires that the procurement by made through another agency or a specified source; or

(6) the disclosure of the agency's needs to more than one source would compromise the national security.

(f) The head of an agency may not award a contract using noncompetitive procedures unless—

(1) in the case of any contract other than a small purchase, a notice has been published with respect to such contract pursuant to section 2305(c) of this title and all bids, proposals, and quotations received in response to such notice have been considered by such head of an agency; and

(2) in the case of any contract exceeding $100,000, the use of such procedures is approved by the head of the organizational element of such agency which has the responsibility to enter into such contract or by a designee of the head of such organizational element who is higher in such organizational element than the contracting officer issuing the solicitation with respect to such contract.

[§ 2305. Formal advertisements for bids; time; opening; award; rejection

[(a) Whenever formal advertising is required under section 2304 of this title, the advertisement shall be made a sufficient time before the purchase or contract. The specifications and invitations for bids shall permit such free and full competition as is consistent with the procurement of the property and services needed by the agency concerned. Except in a case where the Secretary of Defense determines that military requirements necessitate specification of container sizes, no advertisement or invitation to bid for the carriage of Government property in other than Government-owned cargo containers shall specify carriage of such property in cargo containers of any stated length, height, or width.

[(b) The specifications in invitations for bids must contain the necessary language and attachments, and must be sufficiently descriptive in language and attachments, to permit full and free competition. If the specifications in an invitation for bids do not carry the necessary descriptive language and attachments, or if those attachments are not accessible to all competent and reliable bidders, the invitation is invalid and no award may be made.

[(c) Bids shall be opened publicly at the time and place stated in the advertisement. Awards shall be made with reasonable promptness by giving written notice to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States, price and other factors considered. However, all bids may be rejected if the head of the agency determines that rejection is in the public interest.

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[(d) If the head of the agency considers that any bid received after formal advertising evidences a violation of the antitrust laws, he shall refer the bid to the Attorney General for appropriate action.]

§ 2305. Solicitation, evaluation, and award procedures; notice requirements

(a)(1)(A) Each solicitation under this title shall include specifications which—

(i) consistent with the needs of the agency, permit effective competition; and

(ii) include restrictive provisions or conditions only to the extent necessary to satisfy such needs or as authorized by law.

(B) For the purposes of subparagraph (A) of this paragraph, the type of specification included in any solicitation shall depend on the nature of the needs of the agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of—

(i) function so that a variety of products or services may qualify;

(ii) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or

(iii) design requirements.

(2) Each solicitation for sealed bids or competitive proposals other than for small purchases shall include, in addition to the specifications described in paragraph (1) of this subsection—

(A) a statement of—

(i) all significant factors, including price, which the executive agency reasonably expects to consider in evaluating sealed bids or competitive proposals; and

(ii) the relative importance assigned to those factors;

(B) in the case of sealed bids—

(i) a statement that sealed bids will be evaluated without discussions with the bidders; and

(ii) the time and place for the opening of the sealed bids; and

(C) in the case of competitive proposals—

(i) a statement that the proposals are intended to be evaluated with, and awards made after, discussions with the offerors but might be evaluated and awarded without discussions with the offerors; and

(ii) the time and place for submission of proposals.

(b)(1) The head of an agency shall evaluate sealed bids and competitive proposals based on the factors specified in the solicitation.

(2) All sealed bids or competitive proposals received in response to a solicitation may be rejected if the head of an agency determines that such action is in the public interest.

(3) Sealed bids shall be opened publicly at the time and place stated in the solicitation. The head of an agency shall evaluate the bids without discussions with the bidders and shall, except as provided in paragraph (2) of this subsection, award a contract with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, con-

sidering the price and the other factors included in the solicitation under subsection (a)(2)(A) of this section. The award of a contract shall be made by transmitting written notice of the award to the successful bidder.

(4)(A) The head of an agency shall evaluate competitive proposals and may award a contract—

(i) after discussions conducted with the offerors at any time after receipt of the proposals and prior to the award of the contract; or

(ii) without discussions with the offerors beyond discussions conducted for the purpose of minor clarification.

(B) In the case of award of a contract under subparagraph (A)(i) of this paragraph, the head of an agency shall conduct, before such award, written or oral discussions with all responsible offerors who submit proposals within a competitive range, price and other evaluation factors considered.

(C) In the case of award of a contract under subparagraph (A)(ii) of this paragraph, the head of an agency shall award the contract based on the proposals received (and as clarified, if necessary, in discussions conducted for the purpose of minor clarification).

(D) The head of an agency shall, except as provided in paragraph (2) of this subsection, award a contract with reasonable promptness to the responsible offeror whose proposal is most advantageous to the United States, considering price and other factors included in the solicitation under subsection (a)(2)(A) of this section. The head of the agency shall award the contract by transmitting written notice of the award to such offeror and shall promptly notify all other offerors of the rejection of their proposals.

(5) If the head of an agency considers that any bid received under sealed bid procedures evidences a violation of the antitrust laws, he shall refer the bid to the Attorney General for appropriate action.

(c)(1)(A) Except as provided in paragraph (3) of this subsection—

(i) a head of an agency intending to solicit bids, proposals, or quotations for a contract for property or services at a price exceeding $10,000 shall furnish for publication by the Secretary of Commerce a notice described in paragraph (2) of this subsection;

(ii) a head of an agency awarding a contract for property or services at a price exceeding $10,000 shall furnish for publication by the Secretary of Commerce a notice announcing such award if there is likely to be any subcontract under such contract.

(B) The Secretary of Commerce shall publish promptly in the Commerce Business Daily each notice required by subparagraph (A) of this paragraph.

(C) Whenever a head of an agency is required by subparagraph (A)(i) of this paragraph to furnish a notice of a solicitation to the Secretary of Commerce, such head of an agency may not—

(i) issue such solicitation earlier than fifteen days after the date on which such notice is published by the Secretary of Commerce; or

(ii) establish a deadline for the submission of bids, proposals, or quotations in response to such solicitation that is earlier than thirty days after the date on which such solicitation is issued.

(2) each notice required by subsection (1)(A)(i) of this subsection shall include—

(A) a description of the property or services to be contracted for, which description is not unnecessarily restrictive of competition;

(B) the name and address of the officer or employee of the agency who may be contacted for the purpose of obtaining a copy of the solicitation;

(C) a statement that any person may submit a bid, proposal, or quotation which shall be considered by the agency; and

(D) in the case of a procurement using noncompetitive procedures, a statement of the reason justifying the use of noncompetitive procedures and the identity of the intended source.

(3)(A) A notice is not required under subsection (1)(A) if this subsection if the notice would disclose the agency's needs and the disclosure of such needs would compromise the national security.

(B) The requirements of subsection (1)(A)(i) of this subsection do not apply—

(i) to any procurement under conditions described in clause (2), (3), (4), or (5) of section 2304(e) of this title; and

(ii) in the case of any procurement for which the head of the agency carrying out such procurement makes a determination in writing, with the concurrence of the Administrator of the Small Business Administration, that it is not appropriate or reasonable to publish a notice before issuing a solicitation.

§2306. Kinds of contracts

(a) The cost-plus-a-percentage-of-cost system of contracting may not be used. Subject to this limitation and subject to subsections (b)–(f), the head of an agency **[**may, in negotiating contracts under section 2304**]** *may in awarding contracts after using other than sealed bid procedures* of this title, make any kind of contract that he considers will promote the best interests of the United States.

(b) Each contract **[**negotiated under section 2304**]** *awarded after using other than sealed bid procedures* of this title shall contain a warranty, determined to be suitable by the head of the agency, that the contractor has employed or retained no person or selling agency to solicit or obtain the contract under an understanding or agreement for a commission, percentage, brokerage, or contingent fee, except a bona fide employee or established commercial or selling agency maintained by him to obtain business. If a contractor breaks such a warranty the United States may annul the contract without liability or may deduct the commission, percentage, brokerage, or contingent fee from the contract price or consideration.

(c) No cost contract, cost-plus-a-fixed-fee contract, or incentive contract may be made under **[**section 2304 of this title**]** *this chapter* unless the head of the agency determines that such a contract is likely to be less costly to the United States than any other kind of contract or that it is impracticable to obtain property or services of the kind or quality required except under such a contract.

(d) The fee for performing a cost-plus-a-fixed-fee contract for experimental, developmental, or research work may not be more than 15 percent of the estimated cost of the contract, not including the fee. The fee for performing a cost-plus-a-fixed-fee contract for

architectural or engineering services for a public work or utility plus the cost of those services to the contractor may not be more than 6 percent of the estimated cost of that work or project, not including fees. The fee for performing any other cost-plus-a-fixed-fee contract may not be more than 10 percent of the estimated cost of the contract, not including the fee. Determinations under this subsection of the estimated costs of a contract or project shall be made by the head of the agency at the time the contract is made.

(e) Each cost contract and each cost-plus-a-fixed-fee contract shall provide for notice to the agency by the contractor before the making, under the prime contract, of—

(1) a cost-plus-a-fixed-fee subcontract; or

(2) a fixed-price subcontract or purchase order involving more than $25,000 or 5 percent of the estimated cost of the prime contract.

(f)(1) A prime contractor or any subcontractor shall be required to submit cost or pricing data under the circumstances listed below, and shall be required to certify that, to the best of his knowledge and belief, the cost of pricing data he submitted was accurate, complete and current—

(A) [prior to the award of any negotiated prime contract under this title where the price is expected to exceed $500,000;] *prior to the award of any prime contract under this title after using other than sealed bid procedures where the price is expected to exceed $100,000;*

(B) prior to the pricing of any contract change or modification for which the price adjustment is expected to exceed $100,000, or such lesser amount as may be prescribed by the head of the agency;

(C) prior to the award of a subcontract at any tier, where the prime contractor and each higher tier subcontractor have been required to furnish such a certificate, if the price of such subcontract is expected to exceed $100,000; or

(D) prior to the pricing of any contract change or modification to a subcontract covered by clause (C), for which the price adjustment is expected to exceed $100,000, or such lesser amount as may be prescribed by the head of the agency.

(2) Any prime contract or change or modification thereto under which such certificate is required shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by which it may be determined by the head of the agency that such price was increased because the contractor or any subcontractor required to furnish such a certificate, furnished cost or pricing data which, as of a date agreed upon between the parties (which date shall be as close to the date of agreement on the [negotiated] price as is practicable), was inaccurate, incomplete, or noncurrent: *Provided,* That the requirements of this subsection need not be applied to contracts of subcontracts where the price [negotiated] is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, prices set by law or regulation or, in exceptional cases where the head of the agency determines that the requirements of this subsection may be waived and states in writing his reasons for such determination.

(3) For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this subsection, any authorized representative of the head of the agency who is an employee of the United States Government shall have the right, until the expiration of three years after final payment under the contract or subcontract, to examine all books, records, documents, and other data of the contractor or subcontractor related to the [negotiation,] *proposal for the contract, the discussions conducted on the proposal under this title,* pricing, or performance of the contract or subcontract.

(g)(1) The head of an agency may enter into contracts for periods of not more than five years for the following types of services (and items of supply related to such services) for which funds would otherwise be available for obligation only within the fiscal year for which appropriated—

(A) operation, maintenance, and support of facilities and installations;

(B) maintenance or modification of aircraft, ships, vehicles, and other highly complex military equipment;

(C) specialized training necessitating high quality instructor skills (for example, pilot and aircrew members; foreign language training); and

(D) base services (for example, ground maintenance; in-plane refueling; bus transportation; refuse collection and disposal);

whenever he finds that:

(i) there will be continuing requirement for the services consonant with current plans for the proposed contract period;

(ii) the furnishing of such services will require a substantial initial investment in plant or equipment, or the incurrence of substantial contingent liabilities for the assembly, training, or transportation of a specialized work force; and

(iii) the use of such a contract will promote the best interests of the United States by encouraging effective competition and promoting economies in operation.

(2) In entering into such contracts, the head of the agency shall be guided by the following principles:

(A) The portion of the cost of any plant or equipment amortized as a cost of contract performance should not exceed the ratio between the period of contract performance and the anticipated useful commercial life of such plant or equipment. Useful commercial life, for this purpose, means the commercial utility of the facilities rather than the physical life thereof, with due consideration given to such factors as location of facilities, specialized nature thereof, and obsolescence.

(B) Consideration shall be given to the desirability of obtaining an option to renew the contract for a reasonable period not to exceed three years, at prices not to include charges for plant, equipment and other nonrecurring costs, already amortized.

(C) Consideration shall be given to the desirability of reserving in the agency the right, upon payment of the unamortized portion of the cost of the plant or equipment, to take title thereto under appropriate circumstances.

(3) In the event funds are not made available for the continuation of such a contract into a subsequent fiscal year, the contract shall be canceled or terminated, and the costs of cancellation or termination may be paid from—

(A) appropriations originally available for the performance of the contract concerned;

(B) appropriations currently available for procurement of the type of services concerned, and not otherwise obligated; or

(C) funds appropriated for those payments.

(h)(1) To the extent that funds are otherwise available for obligation, the head of an agency may make multiyear contracts (other than contracts described in paragraph (6)) for the purchase of property, including weapon systems and items and services associated with weapon systems (or the logistics support thereof), whenever he finds—

(A) that the use of such a contract will promote the national security of the United States and will result in reduced total costs under the contract;

(B) that the minimum need for the property to be purchased is expected to remain substantially unchanged during the contemplated contract period in terms of production rate, procurement rate, and total quantities;

(C) that there is a reasonable expectation that throughout the contemplated contract period the Department of Defense will bequest funding for the contract at the level required to avoid contract cancellation;

(D) that there is a stable design for the property to be acquired and that the technical risks associated with such property are not excessive; and

(E) that the estimates of both the cost of the contract and the anticipated cost avoidance through the use of a multiyear contract are realistic.

(2)(A) The Secretary of Defense shall prescribe defense acquisition regulations to promote the use of multiyear contracting as authorized by paragraph (1) in a manner that will allow the most efficient use of multiyear contracting.

(B) Such regulations may provide for cancellation provisions in such multiyear contracts to the extent that such provisions are necessary and in the best interests of the United States. Such cancellation provisions may include consideration of both recurring and nonrecurring costs of the contractor associated with the production of the items to be delivered under the contract.

(C) In order to broaden the defense industrial base, such regulations shall provide that, to the extent practicable—

(i) multiyear contracting under paragraph (1) shall be used in such a manner as to seek, retain, and promote the use under such contracts of companies that are subcontractors, vendors, or suppliers; and

(ii) upon accrual of any payment or other benefit under such a multiyear contract to any subcontractor, vendor, or supplier company participating in such contract, such payment or benefit shall be delivered to such company in the most expeditious manner practicable.

(D) Such regulations shall also provide that, to the extent practicable, the administration of this subsection, and of the regulations prescribed under this subsection, shall not be carried out in a manner to preclude or curtail the existing ability of agencies in the Department of Defense to—

(i) provide for competition in the production of items to be delivered under such a contract; or

(ii) provide for termination of a prime contract the performance of which is deficient with respect to cost, quality, or schedule.

(3) Before any contract described in paragraph (1) that contains a clause setting forth a cancellation ceiling in excess of $100,000,000 may be awarded, the head of the agency concerned shall give written notificaion of the proposed contract and of the proposed cancellation ceiling for that contract to the Committees on Armed Services and on Appropriations of the Senate and House of Representatives, and such contract may not then be awarded until the end of a period of 30 days beginning on the date of such notification.

(4) Contracts made under this subsection may be used for the advance procurement of components, parts, and materials necessary to the manufacture of a weapon system, and contracts may be made under this subsection for such advance procurement, if feasible and practical, in order to achieve economic-lot purchases and more efficient production rates.

(5) In the event funds are not made available for the continuation of a contract made under this subsection into a subsequent fiscal year, the contract shall be canceled or terminated, and the costs of cancellation or termination may be paid from—

(A) appropriations originally available for the performance of the contract concerned;

(B) appropriations currently available for procurement of the type of property concerned, and not otherwise obligated; or

(C) funds appropriated for those payments.

(6) This subsection does not apply to contracts for the construction, alteration, or major repair of improvements to real property or contracts for the purchase of property to which section 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759) applies.

(7) This subsection does not apply to the Coast Guard or the National Aeronautics and Space Administration.

(8) For the purposes of this subsection, a multiyear contract is a contract for the purchase of property or services for more than one, but not more than five, program years. Such a contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds and (if it does so provide) may provide for a cancellation payment to be made to the contractor if such appropriations are not made.

(i) Except in a case in which the Secretary of Defense determines that military requirements necessitate the specification of container sizes, no contract for the carriage of Government property in other than Government-owned containers shall require carriage of such property in cargo containers of any stated length, height, or width.

§ 2307. Advance payments

(a) The head of any agency may—

(1) make advance, partial, progress, or other payments under contracts for property or services made by the agency; and

(2) insert in bid solicitations for procurement of property or services a provision limiting to small business concerns advance or progress payments.

(b) Payments made under subsection (a) may not exceed the unpaid contract price.

(c) Advance payments made under subsection (a) may be made only if the contractor gives adequate security and after a determination by the head of the agency that to do so would be in the public interest. Such security may be in the form of a lien in favor of the United States on the property contracted for, on the balance in an account in which such payments are deposited, and on such of the property acquired for performance of the contract as the parties may agree. This lien is paramount to any other liens.

(d) Payments under subsection (a) in the case of any contract, other than partial, progress, or other payments specifically provided for in such contract at the time such contract was initially entered into, may not exceed $25,000,000 unless the Committees on Armed Services of the Senate and the House of Representatives have been notified in writing of such proposed payments and 60 days of continuous session of Congress have expired following the date on which such notice was transmitted to such Committees and neither House of Congress has adopted, within such 60-day period, a resolution disapproving such payments. For purposes of this section, the continuity of a session of Congress is broken only by an adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of such 60-day period.

§ 2308. Assignment and delegation of procurement functions and responsibilities

Subject to section 2311 of this title, to facilitate the procurement of property and services covered by this chapter by each agency named in section 2303 of this title for any other agency, and to facilitate joint procurement by those agencies—

(1) the head of an agency may, within his agency, delegate functions and assign responsibilities relating to procurement;

(2) the heads of two or more agencies may by agreement delegate procurement functions and assign procurement responsibilities from one agency to another of those agencies or to an officer or civilian employee of another of those agencies; and

(3) the heads of two or more agencies may create joint or combined offices to exercise procurement functions and responsibilities.

§ 2309. Allocation of appropriations

(a) Appropriations available for procurement by an agency named in section 2303 of this title may, through administrative allotment, be made available for obligation for procurement by any

other agency in amounts authorized by the head of the allotting agency and without transfer of funds on the books of the Department of the Treasury.

(b) A disbursing officer of the allotting agency may make any disbursement chargeable to an allotment under subsection (a) upon a voucher certified by an officer or civilian employee of the procuring agency.

§ 2310. Determinations and decisions

(a) Determinations and decisions required to be made under this chapter by the head of an agency may be made for an individual purchase or contract or for a class of purchases or contracts. Such a determination or decision is final.

[(b) Each determination or decision under clauses (11)–(16) of section 2304(a), section 2306(c), section 2306(g)(1), section 2307(c), or section 2313(c) of this title and a decision to negotiate contracts under clauses (2), (7), (8), (10), (12), or for property or supplies under clause (11) of section 2304(a), shall be based on a written finding by the person making the determination or decision, which finding shall set out facts and circumstances that (1) are clearly illustrative of the conditions described in clauses (11)–(16) of section 2304(a), (2) clearly indicate why the type of contract selected under section 2306(c) is likely to be less costly than any other type or that it is impracticable to obtain property or services of the kind or quality required except under such a contract kind or quality required except under such a contract, (3) support of the findings required by section 2306(g)(1), (4) clearly indicates why advance payments under section 2307(c) would be in the public interest, (5) clearly indicate why the application of section 2313(b) to a contract or subcontract with a foreign contractor or foreign subcontractor would not be in the public interest, or (6) clearly and convincingly establish with respect to the use of clauses (2), (7), (8), (10), (12), and for property or supplies under clause (11) of section 2304(a), that formal advertising would not have been feasible and practicable. Such a finding is final and shall be kept available in the agency for at least six years after the date of the determination or decision. A copy of the finding shall be submitted to the General Accounting Office with each contract to which it applies.]

(b) Each determination or decision under section 2306(c), section 2306(g)(1), section 2307(c), or section 2313(c) of this title shall be based on a written finding by the person making the determination or decision, which finding shall set out facts and circumstances that (1) clearly indicate why the type of contract selected under section 2306(c) is likely to be less costly than any other type or that it is impracticable to obtain property or services of the kind or quality required except under such a contract, (2) support the findings required by section 2306(g)(1), (3), clearly indicate why advance payments under section 2307(c) would be in the public interest, or (4) clearly indicate why the application of section 2313(b) to a contract or subcontract with a foreign contractor or foreign subcontractor would not be in the public interest. Such a finding is final and shall be kept available in the agency for at least six years after the date of the determination or decision. A copy of the finding shall be

submitted to the General Accounting Office with each contract to which it applies.

§ 2311. Delegation

[The head of an agency may delegate, subject to his direction, to any other officer, or official of that agency, any power under this chapter except the power to make determinations and decisions under clauses (11)–(16) of section 2304(a) of this title. However, the power to make a determination or decision under section 2304(a)(11) of this title may be delegated to any other officer or official; of that agency who is responsible for procurement, and only for contracts requiring the expenditure of not more than $5,000,000.]

The head of an agency may delegate, subject to his direction, to any other officer or official of that agency, any power under this chapter.

§ 2312. Remission of liquidated damages

Upon the recommendation of the head of an agency, the Comptroller General may remit all or part, as he considers just and equitable, of any liquidated damages assessed for delay in performing a contract, made by that agency, that provides for such damages.

§ 2313. Examination of books and records of contractor

(a) An agency named in section 2303 of this title of entitled, through an authorized representative, to inspect the plant and audit the books and records of—

(1) a contractor performing a cost or cost-plus-a-fixed-fee contract made by that agency under this chapter; and

(2) a subcontractor performing any subcontract under a cost-plus-a-fixed-fee contract made by that agency under this chapter.

(b) Except as provided in subsection (c), each contract [negotiated] *awarded after using other than sealed bid procedures* under this chapter shall provide that the Comptroller General and his representatives are entitled, until the expiration of three years after final payment, to examine any books, documents, papers, or records of the contractor, or any of his subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract.

(c) Subsection (b) does not apply to a contract or subcontract with a foreign contractor or foreign subcontractor if the need of the agency determines, with the concurrence of the Comptroller General or his designee, that the application of that subsection to the contract or subcontract would not be in the public interest. However, the concurrence of the Comptroller General or his designee is not required—

(1) where the contractor or subcontractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its books, documents, papers, or records available for examination; and

(2) where the head of the agency determines, after taking into account the price and availability of the property or serv-

ices from United States sources, that the public interest would be best served by not applying subsection (b).

If subsection (b) is not applied to a contract or subcontract based on a determination and under clause (2), a written report shall be furnished to the Congress.

§ 2314. Laws inapplicable to agencies named in section 2303 of this title

Sections 5, 6, 6a, and 13 of title 41 do not apply to the procurement of property or services by the agencies named in section 2303 of this title.

§ 2315. Laws inapplicable to the procurement of automatic data processing equipment and services for certain defense purposes

(a) Section 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 795) is not applicable to the procurement by the Department of Defense of automatic data processing equipment or services if the function, operation, or use of the equipment or services—

(1) involves intelligence activities;

(2) involves cryptologic activities related to national security;

(3) involves the command and control of military forces;

(4) involves equipment that is an integral part of a weapon or weapons system; or

(5) subject to subsection (b), is critical to the direct fulfillment of military or intelligence missions.

(b) Subsection (a)(5) does not include procurement of automatic data processing equipment or services to be used for routine administrative and business applications (including payroll, finance, logistics, and personnel management applications).

§ 2316. Record requirements

(a) Each head of an agency shall establish and maintain for a period of five years a record, by fiscal year, of the procurements, other than small purchases, in such fiscal year in which—

(1) noncompetitive prcedures were used; and

(2) only one bid or proposal was received after competitive procedures were used.

(b) The record established under subsection (a) of this section shall include, with respect to each procurement—

(1) information identifying the source from whom the purchase was made or to whom the contract was awarded;

(2) the property or services obtained by the Government under the procurement;

(3) the total cost of the procurement;

(4) the reason under section 2304(e) of this title for the use of noncompetitive procedures; and

(5) the position of the officers or employees of the agency who required and approved the use of noncompetitive procedures in such procurement.

(c) The information included in the record established and maintained under subsection (a) shall be transmitted to the Federal Pro-

curement Data Center referred to in section 6(d)(5) of the Office of Federal Procurement Policy Act (41 U.S.C. 405(d)(5)).

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